No. 9049

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, LIMITED,
a Corporation, *Appellant,*

vs.

IDAHO FARMS COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States, for the District of Idaho, Southern Division.

WAYNE A. BARCLAY,
Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Twin Falls, Idaho;

RICHARDS & HAGA,
Boise, Idaho,

Attorneys for Appellant.

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SUBJECT INDEX

TABLE OF CASES

TEXTBOOKS AND ENCYCLOPEDIAS

STATUTES

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STATEMENT AS TO JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

District Court Had Jurisdiction:

Appellee is a Delaware corporation (Finding XII, R. 98).

Appellant is an Idaho corporation (R. 2, 31).

The requisite jurisdictional amount was alleged in the complaint (R. 2), and admitted by the answer (R. 31).

Jurisdiction of This Court:

This Court has jurisdiction of the appeal under Section 128, Judicial Code, as amended (Title 28, Section 225, U.S.C.).

The decree was dated and filed June 27, 1938 (R. 143, 134).

The notice of appeal was filed and the appeal perfected September 26, 1938 (R. 168).

There is, accordingly, diversity of citizenship. The case involves appellant's liens on approximately 11,000 acres of land aggregating at the time of the suit upwards of $40,000, exclusive of interest, and the right to make assessments in the future against such lands. The rights of both parties depend on the proper construction of certain statutes of the State of Idaho.

STATEMENT OF CASE

Appellee brought its suit on November 24, 1937, in the Court below to quiet its title to approximately 11,000 acres of land described in Exhibit No. 1 to the Findings of Fact and Conclusions of Law (R. 114-133), situated within what is commonly referred to as the "North Side Project."

Appellee alleges and appellant admits that appellee constructed the irrigation works for the reclamation of said lands and other lands, aggregating upwards of 170,000 acres, under that body of federal and state laws commonly referred to as the Carey Act, consisting of Sections 641 and 642 of Title 43, United States Code, and the laws of the State of Idaho passed in furtherance thereof and included in Sections 41-1701 to 41-1740, Idaho Code Annotated, 1932; that such irrigation works were constructed under contracts between appellee, then known as the Twin Falls North Side Land & Water Company, and the State of Idaho (Plaintiff's Exhibits Nos. 1, 2, and 3), dated, respect-

ively, April 15, 1907, August 21, 1907, and January 2, 1909 (R. 3).

It appears from the pleadings, findings, and evidence that appellee was organized on or about the month of April, 1907, under the name of Twin Falls North Side Land & Water Company, a Delaware corporation, for the purpose of promoting the development of said North Side Project; that about the same time its promoters also organized the Twin Falls North Side Investment Company, Limited, under the laws of Idaho for the purpose of developing townsites, building hotels, operating banks and making investments in connection with the development of said irrigation project (R. 227); that about December, 1936 (R. 204-207, Finding IX, R. 92-93), the Investment Company was merged under the laws of Delaware with the Twin Falls North Side Land and Water Company and the name of the latter changed to "Idaho Farms Company," appellee herein. Accordingly, appellee stands in the shoes of the merged corporations—Twin Falls North Side Land & Water Company and Twin Falls North Side Investment Company, Limited.

Appellant was organized by appellee pursuant to the provisions of the first contract (Plaintiff's Exhibit 1) between appellee and the State of Idaho, for the purpose of taking over the operation and maintenance of the irrigation works and distributing the water therefrom to the settlers, to whom appellee sold stock in appellant under contracts of sale conveying one share of stock for each acre of irrigable land entered by the settler. Under the terms of the state and settlers' contracts all the issued and outstanding capital stock in

the appellant company would be owned exclusively by the settlers or owners of land on the project. (Plaintiff's Exhibits Nos. 1, 2, and 3, and Exhibit A, attached to complaint, R. 21-30).

Appellee has acquired from the original purchasers, their grantees or assigns, the lands, water rights, and shares of stock involved in this suit, because of the failure of the settlers to pay the full consideration for the shares so purchased. As shown by the record, and particularly by Exhibit 1 to the Findings of Fact (R. 114-133), title to the land was acquired in some cases by the foreclosure of the settlers' contracts and sheriff's deeds, and in other cases by deeds from the settlers to appellee or its predecessors in interest. The exhibit referred to shows that the title was acquired by appellee or its predecessors in interest at various times, from 1911 till about 1928.

Appellant, in the proper performance of its duties, levied annual assessments against the lands pursuant to Sections 41-1901 to 41-1910, Idaho Code Annotated. Appellee paid all assessments levied to and including the year 1931, but it has not paid the assessments levied during the years 1932 to 1937, inclusive.

By the present action appellee seeks to quiet its title as against the assessments levied during 1935, 1936, and 1937, alleging as the basis therefor that the lands now held by appellee are *exempt* under the state law from assessments levied by appellant, until appellee has received payment in full for the water rights purchased for the irrigation thereof, including the amount paid out for taxes, court costs and cost of foreclosure and sheriff's commission on sale, etc.

The case involves the construction of certain statutes of the State of Idaho; particularly Section 41-1726, on which appellee rests its case, and Sections 41-1901 to 41-1910, inclusive, under which appellant's assessments were made; also other statutes which have a bearing on the construction of the statutes referred to, or which apply to certain issues arising under the pleadings in the case. The statutes are set out in full in an appendix to this brief, or quoted in the body of the brief.

From this general statement we now pass to a more detailed statement of the facts.

The answer sets up a number of defenses from which, as supplemented by the evidence or findings, it appears:

Same Questions Involved in Cases Pending in State Courts:

That at the time the present action was commenced by appellee there were pending in the District Court of the Eleventh Judicial District of the State of Idaho six actions in Jerome County and six actions in Gooding County in which appellant was plaintiff and in which appellee either was the only defendant or the real party in interest, all for the foreclosure by appellant of the liens for assessments made under Sections 41-1901 *et seq.*, against appellee's lands during the years 1932, 1933, and 1934; that in December, 1937, similar foreclosure suits were commenced by appellant against appellee on assessments made during 1935 and 1936; that all of such suits involve the identical questions that are involved in the case at bar, viz., the proper construction of the state statutes under which

the respective parties seek to sustain their respective rights or positions, and whether appellee's lands are exempt from assessments levied by appellant (R. 44-52).

The pendency of the actions referred to is not in controversy. The evidence on the point was uncontradicted (R. 214-217, Defendant's Exhibits Nos. 21 to 34, inc.).

It further appears that appellant obtained an injunction in the State Court (R. 49-50) against appellee from seeking to quiet its title in the present action as against the assessments levied by appellant during the years 1932, 1933, and 1934, and, for the foreclosure of which, suits had been commenced in the State Court prior to the commencement of this action in the Federal Court; that thereafter appellee amended its complaint in the Federal Court action so as to eliminate all reference to the assessments for those years.

Plea In Abatement:

Appellant plead the pendency of the actions in the State Court in abatement of the present action on the ground that appellee could set up in the actions pending in the State Court the question as to whether its lands are exempt from assessments under Sec. 41-1901, I.C.A., and therein seek the construction of the identical state statutes that are involved in the case at bar.

The Trial Court held the cases did not present the identical questions (R. 104, XVII), presumably because if the State Court held that appellee's lands were not exempt under the statute, there might be a difference in the mechanics of the filing or form of

the notice of lien, and that that would outweigh the preference that should be given to the State Courts in the construction of a state statute. We note, however, that the Court found that the liens were in proper form and had been filed as required by law and that the only question was the construction of the state statute (R. 99-103).

Trial Court Held Appellee's Lands Were Exempt From Assessment:

Appellee claimed, and the Court concluded as a matter of law (R. 111) and decreed (R. 135) that appellee's lands were *exempt* from assessments under Chapter 19, Title 41, Idaho Code, until the lands had been resold and appellee had received the full amount due it as shown by Exhibit No. 1 (R. 114-133), together with any additional taxes which appellee may hereafter pay.

Lien On Excess of Proceeds:

After having held that the lands and water rights were exempt from assessments levied by appellant, as stated above, the Court further held (R. 113, 137) that if any tract of land was sold for more than the amount due appellee, principal, interest, taxes and costs, the assessments which appellant levied during the years 1936 and 1937, but not during 1935, should "constitute a lien upon any excess moneys so received by plaintiff as proceeds of the sale of such tract or parcel of property" (R. 137).

Trial Court Overruled Defense of Estoppel:

Appellant in its third affirmative defense (R. 52)

and in its fifth affirmative defense (R. 54) pleaded, and it proved by the testimony of several witnesses (Hurlebaus, R. 224-243; Heiss, R. 243-247; Stocking, R. 262-265; Henderson, R. 220; Eaken, R. 221; Behrnes, R. 223, and Dorman, R. 223) that costly and necessary improvements had been made on the irrigation system by appellant, and large amounts expended for the rental and purchase of additional water rights and storage capacity in American Falls Reservoir, the aggregate of the expenditures so incurred being upwards of $670,000, exclusive of interest (R. 225-226); that such improvements and such additional water, water rights, and storage capacity were necessary and that they were made for the purpose of providing adequate service for all of appellant's stockholders, including appellee as the owner of the lands here in question; that Mr. R. E. Shepherd, president of appellee and manager of its predecessors from about 1913, and representative of the bondholders' committee from about 1913 to December, 1936, had recommended to appellant the making of such improvements, the purchase of such water rights and storage capacity, and the incurring of such obligations; that during practically all the period from January 2, 1917, to December 31, 1937 (R. 107), he was either president or manager of appellant and assisted in preparing its budgets of probable receipts and expenses, and in spreading the assessments over the lands of appellee here in question and other lands; that until the commencement of this suit appellee had not questioned the right of appellant to make assessments against appellee's lands; that all assessments levied from the time appellee first com-

menced to acquire the lands in question—1911 to and including 1931, were paid by appellee without protest or contest and without raising any question as to the right of appellant to levy such assessments, and without claiming that its lands were exempt therefrom.

Appellant claimed that the facts so pleaded and proven—there being no evidence to the contrary—constituted an estoppel and an acquiescence in appellant's construction of the statute under which the assessments were levied and a waiver of appellee's right to now contest the validity of the statute and the priority of the liens thereunder, but the Trial Court held that that the facts so stated did not constitute a defense to appellee's claim (R. 107-8, 113).

Suit to Quiet Title:

Appellant contended that this was a suit to quiet title and not a suit to determine the relative priority of the liens of appellant and appellee, and neither party sought to foreclose its lien in this suit, and foreclosure was not within the scope of the issues.

Merger:

Appellant claimed that there had been a merger of the legal and equitable title of appellee to the lands in question, some of which had been held for nearly twenty-five years; that when appellee took title through foreclosure, sheriff's deed, or by quitclaim deed from the owner, the original lien was merged with the legal title and could not be kept alive as a shield against future assessments levied by appellant. The Trial Court held otherwise.

Rulings On Evidence:

A number of exceptions were taken to the rulings on evidence. These will be found in the specification of errors and in other parts of the brief.

Ambiguity and Uncertainty in Provisions of Decree:

After holding that appellee's lands were exempt from assessments, the Court made some reference in the decree to a lien in favor of appellant for assessments levied during the years 1936 and 1937, "upon any excess moneys" received by appellee from the sale of the lands and water rights here in question (R. 137). It is appellant's contention that no adequate or suitable provision was made for protecting appellant's rights if it is entitled to a lien, as implied by the provision referred to, upon any excess moneys received by appellee from the sale of lands involved in this case.

SPECIFICATION OF ERRORS

Errors in Findings of Fact and Conclusions of Law:

1. The Court erred in finding and concluding (R. 110) that this suit should not be abated, or held in abeyance until the final determination of the suits pending in the State Court between these same parties and involving the same lands and the identical statutes, legal questions and rights involved in the present suit. The record clearly shows that there was no issue between the parties as to the form or contents of the liens or assessments, or as to the time and manner of filing; the controversy was wholly as to the construction of certain state statutes on which the decision of the Supreme Court of the state would be controlling in the Federal Courts.

2. The Court erred in finding and concluding that appellee, although the owner of the lands described in Exhibit No. 1 attached to the Findings (R. 114-133), has also some superior lien thereon under Section 41-1726, Idaho Code Annotated, and that there has not been a merger of the legal and equitable title but that the so-called Carey Act lien created by said section remains in force until appellee has received not only the original purchase price for the water right sold to the settlers, but also a lien under that statute for all taxes, costs of foreclosure, sheriff's commission on sale, etc., paid by appellee, and interest thereon, and that it may hold such lien not only to protect appellee against liens or claims intervening between its original lien and the acquisition of the legal title, but against liens thereafter levied under Chapter 19, Title 41, Idaho Code Annotated, for maintaining and operating said irrigation system and distributing water therefrom.

3. That the Court erred in holding, concluding and decreeing (R. 135) that appellant's lands were exempt from the lien of assessments levied by appellant under Chapter 19, Title 41, Idaho Code Annotated.

4. That the Court erred in finding and concluding (R. 94) that appellee is an agency and instrumentality of the bondholders for realizing upon assets that had been pledged and mortgaged to them for their security and that appellee's rights are enlarged and extended because its stockholders, or some of them, may at one time have been bondholders under the mortgage or trust deed at one time outstanding, but the lien of which has long since been released and discharged.

5. That the Court erred in finding and concluding (R. 113) that appellee was not estopped by its conduct and the conduct of its officers and managers, and barred by its laches from maintaining this action and that its long acquiescence in the validity of the assessments levied by appellant and payment thereof over a long period of years did not constitute a waiver of its right to now reverse its position and contest the construction that has for upwards of twenty years been placed on the statute by both appellant and appellee.

6. That the Court erred in finding and concluding (R. 109, 110, 113) that appellee's failure to use any water on its said lands for more than five years prior to the commencement of this suit did not constitute a loss and abandonment of its water rights for such lands.

7. That the Court erred in finding and concluding (R. 109) that appellee had provided an adequate water supply for the irrigation of all lands under said irrigation system, and that the expenditures which appellant had been compelled to make for the enlargement and improvement of the system and for the purchase of additional water rights and storage rights, were not due to or caused by the failure of appellee to provide an adequate irrigation system and an ample water supply; the evidence being clear and convincing and not contradicted that appellant, for the protection of its stockholders and at the urgent request of appellee's officers, has been compelled to spend upwards of $670,000 for the enlargement of the irrigation system and for the purchase of additional water and storage capacity.

8. That the Court erred in finding and concluding (R. 105-106) that the assessments levied against appellee's lands during the years 1935, 1936, and 1937, were offset by the fact that appellee had not used water for many years on such lands and that such water or part thereof had been used by other stockholders of appellant who received benefit therefrom.

9. That the Court erred in finding and concluding (Finding XVI, R. 104, and Conclusion of Law No. III, R. 110) that appellant's suits in the State District Court for Jerome and Gooding counties, commenced on or about December 24, 1937, to foreclose the lien for the assessments of 1935 and 1936, were not commenced in a proper Court, in view of the fact that the present action had shortly prior thereto been commenced in the Federal Court, and that the suit commenced in the State Court did not, therefore, protect appellant's rights or preserve the lien for the assessment for 1935; and in finding and deciding (R. 104) that "no evidence was admitted or received by the Court tending to show that any proceedings were commenced by defendant in a proper court to enforce the aforesaid liens"—such evidence was excluded by the Court because the foreclosure suit had not been commenced in the Federal Court (R. 218-219).

10. The Court erred in finding and concluding that the suits pending in the State Courts commenced by appellant for the foreclosure of its assessment liens for 1932 to 1934, inclusive, did not involve the same questions, controversies and issues as are involved in the case at bar and did not constitute a ground for abatement of this cause (Finding XVII, R. 104; Conclusion

of Law No. II, R. 110). It appears from the record that the Court decided the case in favor of appellee wholly upon the construction of the state statutes, and the identical statutes are involved in the cases pending in the State Court.

11. The Court erred in finding and concluding (Finding XVIII, R. 105) that there was no evidence showing the amount in the aggregate for the improvements made on the system during the years 1935 to 1937, inclusive. Appellant's evidence is uncontradicted as to the cost of such improvements and shows the amount thereof at the end of 1931 as over $471,000, and at the beginning of 1935 as over $331,000, exclusive of interest (R. 226, 243, and Reporter's Transcript filed with Clerk, pp. 153-154).

12. The Court erred in finding and concluding (Finding XX, R. 108) that the recommendations to appellant by R. E. Shepherd, and his acts and conduct were made as agent and officer of appellant and that although he was the manager of appellee and represented the bondholders' committee and their interests on the project during all of said period, his recommendations, acts and conduct do not furnish a basis for estoppel or waiver against appellee.

13. The Court erred in holding, concluding and decreeing (R. 111, 135), that if appellant had any lien whatever under the assessments for 1936 and 1937, such lien was only upon the excess of the proceeds from the sale by appellee of its lands, after deducting the full amount claimed by appellee as still due it on the original purchase price, plus interest, taxes, and Court

costs and other disbursements made by appellee in connection with such lands.

The Decision Is Against Law:

14. The findings, conclusions, and decree of the Court are against law, and particularly in this:

(a) That the Court erred in refusing and failing to follow the decision of the Supreme Court of Idaho as to the construction that should be placed on Section 41-1726, and on Chapter 19 of Title 41, and other sections of Idaho Code Annotated pertaining to the rights of the parties hereto, and especially in holding that the lien authorized by Section 41-1726 is prior and superior to the lien authorized by Chapter 19 of Title 41, Idaho Code Annotated;

(b) That the Court erred in holding that appelland did not protect its lien for 1935 assessment by the commencement of its action for the foreclosure of such lien in the State Courts for the proper counties, on the 24th day of December, 1937 (R. 104, 218-219;

(c) The Court erred in decreeing that the appellant had no lien on the lands in question, but only upon excess proceeds from the sale thereof (R. 135) and in providing that appellee was required to sell any of said lands to a purchaser offering to pay the amount due appellee (R. 142), thereby leaving no excess out of which appellant could recover on its assessments.

(d) The Court erred in making no provision for the protection of appellant or by which it may recover, either on account of assessments heretofore

levied or hereafter levied, as long as appellee owns the lands in question and although it may farm and use water thereon as other stockholders.

(e) That the decree is ambiguous and uncertain and impossible of enforcement so as to afford any protection whatever to appellant for recovering against the lands in question, the amount heretofore or hereafter extended for improvements on the irrigation system, and for the acquisition of additional water rights and storage capacity, all of which materially adds to the value of appellee's water rights.

(f) That the Court erred in holding and deciding that appellee could maintain a suit to quiet title to its lands when the real controversy was only as to whether appellee had a lien upon its own lands and whether such lien was prior or superior to the lien of appellant.

Errors in Ruling on Evidence:

15. The Court erred in overruling appellant's objection to appellee's questions and attempt to show on cross-examination of appellant's witnesses that stockholders of appellant have used, or had the opportunity of using, water which appellee did not use on the lands in question, and that such use would constitute an offset to the assessments levied by appellant against appellee's lands, to which appellant objected as follows:

> "I object to this line of questioning. He proceeds upon an erroneous theory that the land owner who does not pay his assessments can clear

his account by saying, 'My water was used by the other land owners.' There is no basis in law for that contention. The law says that he shall pay his share, and he can not trade water for what he didn't use, and say, 'You take that and I will not pay the maintenance." And we object also on the ground that the subject is a new matter. It appears on the face of the testimony that these were temporary leases of water, and the water was paid for in those years out of the maintenance paid solely and exclusively by the other users. These people have not paid anything since 1931" (R. 256-257).

16. The Court erred in sustaining appellee's objections to defendant's Exhibits Nos. 33 and 34, being certified copies of the records and files of actions pending in the State District Court for Jerome and Gooding counties, respectively, commenced on December 24, 1937, for the foreclosure of the liens of assessments levied during the years 1935 and 1936, to the introduction of which counsel for appellee objected as follows:

"It is conceded that the plaintiff is the owner of the liens described in this foreclosure suit. This suit we are involved in here was begun on the 24th day of November, 1937, and a month later, after the beginning of this suit, and after the record and files disclosed that appearance was made a suit was begun in another Court to foreclose these liens, and it is our theory that after this Court obtained jurisdiction of the subject matter of these liens no other Court was a proper

Court in which to begin any action for the foreclosing of the liens. The statute under which the foreclosure suit was begun provides as follows: 'No lien provided for in this chapter binds any land for a longer priod than two years after the filing of the statement mentioned in Section 41-1903, unless proceedings be commenced in a proper Court within that time to enforce such lien.' It provides that unless the action is begun to foreclose the lien within two years from the date of the filing of the lien, but in the statute it is called a statement, then the lien ceases, unless the foreclosure is begun in the proper Court, and we think that the record discloses on its face that the suit was not begun in the proper Court, and we object to Exhibits No. 33 and No. 34, and in connection with this objection I move to strike from the record the testimony of a similar suit in Gooding County. I was under the impression that the testimony was simply to identify the exhibits that he had before him, which I thought might be exhibits numbered 35 and 36, and as far as preserving any right of the defendant under the claim of lien, we think that any evidence in regard to the beginning of this suit is of no avail, and we object to the introduction of this, and move to strike the testimony regarding the suit number 3260 and 3261" (R. 218-219).

Whereupon the Court sustained the objection of counsel for appellee, and its motion to strike, to which rulings counsel for appellant duly excepted and the exception was allowed by the Court.

17. The Court erred in sustaining appellee's objections to the introduction of defendant's Exhibits Nos. 38 and 39 (R. 238-240), said exhibits being, respectively, a letter dated October 23, 1925, from appellant's secretary, to Messrs. Walters & Parry, general counsel for appellee and the bondholders' committee, relative to whether or not appellee should pay the assessments levied by appellant against a piece of land involved in this case, said letter having been submitted to counsel for appellee and its predecessors in interest for the purpose of ascertaining appellee's position relative to the payment of assessments so levied, and to which letter counsel replied on October 30, 1925, advising appellant in substance that the Twin Falls North Side Land & Water Company, the trustee for the bondholders, and Twin Falls North Side Investment Company, appellee's predecessors in interest, held the lands as any other private owner; that the lien of the Carey Act contracts no longer existed and that the lands were subject to assessments which should be paid by the company holding title thereto. To the introduction of these letters counsel for appellee objected as follows:

> "MR. SNOW: We object to the introduction for the following reasons: It is apparently a letter from E. A. Walters, who was Judge Walters, and it is dated October 30th, 1925, and it expressed an opinion as to one of the points in controversy in this case. In that year, 1925, there was in force at that time an opinion and decision of this Court which was apparently adverse, and in fact,

wholly adverse to the contention that plaintiff is now asserting, and subsequently on appeal the decision rendered by this Court was unanimously reversed, and thereafter it was reviewed by the Supreme Court of the United States, and on May 31st, 1927, the Supreme Court unanimously upheld the Circuit Court of Appeals, and the opinion I have reference to is the opinion of this Court which was erroneous and which Judge Walters followed, which in turn was declared to be entirely erroneous.

"MR. STEPHAN: I would like to correct Mr. Snow on that. I think this letter shows conclusively that the letter was written after the opinion was handed down from the Circuit Court of Appeals. Both the opinion of this Court and of the Circuit Court of Appeals was available to counsel and was considered by him at the time this opinion was written."

Appellee's objection was sustained by the Court and an exception granted appellant.

SUMMARY OF ARGUMENT

I

The Trial Court Should Have Sustained the Plea in Abatement:

1. The Federal Courts pass with reluctance upon a seriously controverted question as to the meaning of a state statute when no state court has construed the Act. While the decision of the Federal Court disposes of the particular case, it does not settle the issue of proper construction of the statute.

Thompson, et al., vs. Consolidated Gas Utilities Corp., 300 U.S. 55, 74, 81 L. Ed. 510, 520.

2. The decision of the Trial Court is based entirely upon the construction of the state statutes. The foreclosure suits brought by appellant against appellee in the State Courts, and therein pending when the case at bar was commenced, presented for construction the identical statutes involved in this suit, and every question and every right, urged by appellee in the case at bar, it can present in the suits so pending in the State Court. In view of the controlling effect of the construction of these statutes by the State Court, to the end that there may be no conflicting rules or conflicting decisions imposed upon appellant and other canal companies in the levying and collection of assessments, either upon individuals or water users on the same project or on different projects in the state, and in order to promote uniformity in the application of important statutes that affect thousands of water users throughout the state, the Trial Court should have invoked the rule of comity and sustained the plea in abatement.

City of Salem vs. Oregon-Washington Water Service Co., 144 Ore. 92, 23 Pac. (2d) 539, 544.

Covell vs. Heyman, 111 U.S. 176, 182, 28 L. Ed. 390, 392.

Kline vs. Burke Constr. Co., 260 U.S. 226, 67 L. Ed. 226.

Baltimore & O. R. Co. vs. Wabash R. Co. (C. C.A. 7), 119 F. 680.

Underground Electric Railways Co. vs. Owsley, et al. (C.C.A. 2), 176 F. 26, 38.

3. The cases in the State Court involve the same subject matter; the construction of the same statutes; the identical lands and water rights here involved; the same parties, and appellee's claim that the lands are exempt from assessment and its claim to a superior lien under Section 41-1726. A decision in favor of appellee in any one of the State Court cases on the points on which appellee relies in the case at bar would result in an annulment of appellant's liens and its right to make future assessments against appellee's lands. The decision in favor of appellee in the State Court would be more conclusive, broader and more far-reaching than a decision in the case at bar. In such cases the Federal Court should either sustain the plea in abatement or dismiss the case.

Matlock vs. Matlock, 87 Ore. 307, 170 Pac. 528.
7 R.C.L., pp. 1051 and 1067.
Beale on Conflict of Laws, Secs. 101.1 and 101.2.
Harkin vs. Brundage, 276 U.S. 36, 72 L.Ed. 457.
Farmers Loan & Trust Co. vs. Lake Street etc. Co., 177 U.S. 51, 44 L. Ed. 667.
Morgan Engineering Co. vs. General Castings Co. (C.C.A. 3), 177 F. 347.
Mound City Co. vs. Castleman, 177 F. 510.
Mound City Co. vs. Castleman (C.C.A. 8), 187 F. 921.

This Is a Suit to Quiet Appellee's Title:

4. This is not a suit to determine the amount and relative priorities of the liens claimed by appellee and

appellant, respectively. Appellee rests its case on its legal title and uses the alleged Carey Act lien as a protecting shield for the legal title. It can prevail only on the theory that its land was wholly exempt from assessments and not on the theory that it has a Carey Act lien which is prior and superior to the lien of the assessments levied by appellant.

5. Appellee did not seek to foreclose in this suit its alleged Carey Act lien. The case presented no issue under which the relative priorities of appellee's and appellant's liens could be determined, or for the foreclosure of the liens, and the sale of the land under the supervision of the Court, so that the proceeds could be disbursed and applied as in other foreclosure suits. The decree affords appellant no protection under recognized remedies and procedure of courts of equity if it is a case of both parties having liens against the land.

II

Appellee's Lands Are Not Exempt from Assessment:

6. An intention on the part of the Legislature to grant an exemption from assessments must be expressed in clear and unmistakable terms. When a privilege or exemption is claimed under a statute, it is to be construed strictly against the property owner. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption; it can not be made out by inference or implication but must appear beyond reasonable doubt from the language of the statute.

2 Cooley on Taxation (4th Ed.), Sec. 672.
Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.
Board of Directors vs. Board of Review, 248 Ill. 590, 94 N. E. 153.
Honolulu Rapid Tr. & L. Co. vs. Wilder, 211 U.S. 137, 53 L. Ed. 121.

III

Merger of Carey Act Lien and Legal Title:

7. The law of merger does not permit a party to occupy indefinitely the dual position of holder of the legal title and owner of a Carey Act lien on such title. The only exception to the law of merger is where there are intervening liens or encumbrances against which the prior lien may be preserved.

41 C.J., pp. 775, 780.
Thompson on Real Property, Sec. 4680 et seq.
2 Jones on Mortgages (8th Ed.), Sec. 1080.

8. When appellee foreclosed its lien for default by a settler in payment of the purchase price, it bid in the land and water rights at foreclosure sale in full satisfaction of the debt. It is elementary that the extinguishment of the debt, *ipso facto*, discharges the lien securing the same.

Henson vs. Henson, 151 Tenn. 137, 268 S.W. 378, 37 A.L.R. 1131, 1136.
2 Jones on Mortgages (8th Ed.), Sec. 950.
Shaner vs. Rathdrum State Bank, 29 Ida. 576, 161 Pac. 90.
41 C.J., p. 776.
10 R.C.L., p. 666.

IV

Appellant's Lien Takes Priority Over All Other Liens, Except the Lien of General Taxes:

9. Section 41-1901, Idaho Code Annotated, expressly declares that appellant's lien shall be "a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant," and that is the construction given to this statute by the Idaho Supreme Court.

Carlson-Lusk Hdwe. Co. vs. Kammann, 39 Ida. 654, 229 Pac. 85.

10. Assessments levied under statutes for the maintenance and operation of irrigation systems and public service enterprises are in the nature of taxes and take precedence over mortgages and other liens and encumbrances, unless the legislative intent clearly indicates otherwise.

61 C.J., pp. 68-75.

11. Assessments levied by irrigation districts for maintenance and operation of an irrigation system are taxes within the contemplation of a statute which makes general taxes a first lien on land, and such assessments have been held superior to an existing mortgage lien, even though there be no express statutory provision as to the rank of the lien for such assessment.

67 C.J., p. 1357.

12. The Idaho Supreme Court has expressly held that Section 41-1901, Idaho Code Annotated, does not impair the obligation of contract, although it gives to

liens created thereunder priority over mortgages executed prior to the assessment.

Fed. Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364.

Sanderson vs. Salmon River Canal Co., 45 Ida. 244, 263 Pac. 32.

13. Appellee's claim of lien under Section 41-1726 is, by the express provision of the statute, limited to priority over liens "created or attempted to be created by the owner and possessor of said land," and that is the construction placed on the statute by the Supreme Court of Idaho.

Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

14. That an irrigation company shall have a prior lien on land for water service has been the established policy in the State of Idaho for over forty years. The statute applies to Carey Act projects such as appellant's.

Sec. 41-806, Idaho Code Annotated.

Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

Blaine County Canal Co. vs. Hansen, 49 Ida. 649, 292 Pac. 240.

V

Appellee Was Not the Owner of Either the Land or the Water; It Was Only a Construction Company:

15. Appellee had no vendor's lien or purchase money mortgage on the land and water rights, and when it

bid in the land and water on foreclosure of its water contracts, or took title by quitclaim deed from settlers in settlement of their obligations, it did not acquire anything that it had originally held, and it does not now stand in the same position it did at the time, or prior to the time, it entered into the original settlers' contracts. When the irrigation works were completed and appellee released from further liability for the construction work, when all available water had been sold and the system transferred to appellant, the state contract had served its purpose.

16. Appellee as a construction company under the state contract was permitted, under the law, to appropriate the water in trust for the settlers on the proposed Carey Act project, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system to be constructed under the state and federal laws, commonly referred to as the Carey Act.

State and Robert Rayl vs. Twin Falls Salmon River Land & Water Co., 30 Ida. 41, 166 Pac. 220.

Adams vs. Twin Falls Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

State vs. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.

Vinyard vs. North Side Canal Co., 38 Ida. 73, 223 Pac. 1072.

Idaho Irr. Co. vs. Pew, 26 Ida. 272, 141 Pac. 1099.

Idaho Irr. Co. vs. Lincoln County, 28 Ida. 98, 152 Pac. 1058.

17. When appellee foreclosed its water contract lien and purchased the land at foreclosure sale in satisfaction of the debt, or took title by deed in satisfaction of the debt, it took the land as any other purchaser or owner, stripped of its original status as a Carey Act construction company under a state contract, and it does not by such transactions become reinvested with the rights it occupied on the initiation of the project.

VI

Appellee Is Estopped from Contesting Validity of Assessments Levied by Appellant:

18. From 1911, when appellee first commenced to acquire the lands here involved until the commencement of this suit in November, 1937, it never protested or otherwise questioned the right of appellant to levy assessments against appellee's lands. The president of appellee, who from 1913 until 1937 was the general manager and directing head of appellee and the companies which were merged into it, and the representative of the bondholders' committee, recommended and urged appellant to make extensive enlargements and improvements on the irrigation system and to purchase water rights at an aggregate cost of more than half a million dollars, which could only be paid out of the assessments levied by appellant; he assisted in estimating the receipts from assessments spread over all the lands; he never questioned the right of appellant to levy assessments against the lands of appellee and of which he had general charge; he

authorized the payment of the assessments to and including 1931. Under the circumstances stated, the law of estoppel applies and appellee can not now be heard to repudiate a construction of the statute on which it has led appellant to rely.

19. It is settled law that a party may waive a statute and even a constitutional provision made for his benefit, and that having once done so he can not afterward ask for its protection.

1 Cooley on Constitutional Limitations (8th Ed.), p. 368.

In the matter of the application of Cooper, Mayor of New York City, 93 N.Y. 507.

Bacon vs. Rice, 14 Ida. 107, 119, 93 Pac. 511.

12 C.J., p. 769.

21 C.J., Secs. 221 and 247, under Estoppel.

Marine Iron Works vs. Weiss (C.C.A. 5), 148 Fed. 145, 153.

Sentenis vs. Ladew, 140 N.Y. 463, 35 N.E. 650.

Mayor etc. vs. Manhattan Ry. Co., 143 N.Y. 1, 26, 37 N. E. 494.

Hull vs. Hull, 158 N.Y.S. 743.

VII

The Trial Court Erroneously Rejected Appellant's Evidence That It Had Protected Its Lien for 1935 Assessment by Bringing the Foreclosure Suits in the State District Court:

20. The statute requires suits to foreclose the liens for the assessments levied by appellant to be commenced in the District Court for the county in which the land is situated.

Sections 41-1907, 5-401 and 9-101, Idaho Code Annotated.

21. Under the Idaho Constitution the District Courts have original jurisdiction in all cases, both at law and in equity.

Section 20, Art. V, Idaho Constitution.

22. The decision of the Trial Court in refusing to admit defendant's Exhibits No. 33 and No. 34 (R. 215-219), because the suits to foreclose the 1935 and 1936 assessment liens were commenced in the State District Court thirty days after the commencement of the present suit in the Federal Court but within two years after filing the statement required by Section 41-1903, was in effect a nullification of the provisions of the statute and constitutional provisions above referred to and deprived appellant of its lien for 1935, aggregating $10,092.36 (R. 236). The decision held the foreclosure proceedings in the State Court void and without force and effect, when it should in no event have gone farther than to enjoin the prosecution of the actions in the State Court pending the final determination of the suit in the Federal Court.

23. There is no authority in law for the Trial Court's action in holding that the assessments against appellee's lands should be annulled because appellee's failure to use its water resulted in some of appellant's stockholders using such water and receiving benefit therefrom. Such decision is directly contrary to the provisions of Section 41-1901, Idaho Code Annotated, that the assessments shall be levied and paid, regardless of whether water be or be not used on the land.

VIII

The Relation of Principal and Agent Exists Between a Client and His Attorney, and the Advice of the Attorney on Which the Client Acts and Which He Applies in the Making of Settlements and Adjustments Is Admissible for the Purpose of Explaining the Action and Intention of the Client, But Not as Evidence of the Law:

24. Defendant's Exhibits No. 38 and No. 39 (R. 238-240) were admissible in evidence for the purpose of showing that appellee intentionally and voluntarily paid the assessments from 1925 to 1931, inclusive, because it believed the assessment statute was valid, and for showing that it acquiesced in appellant's construction of the statute.

7 C.J.S., Sec. 67, p. 850.

2 Am. Jur., Sec. 208, p. 165.

5 Am. Jur., Secs. 67 and 71, pp. 298 and 301.

2 Mechem on Agency, Secs. 2150 and 2178.

Caterpillar Tractor Co. vs. Johnson, 99 Mont. 269, 43 Pac. (2d) 670.

Hansen vs. Hansen, 90 Mont. 597, 4 Pac. (2d) 1088.

Busey vs. Perkins, 168 Md. 19, 176 Atl. 474.

IX

The Decision of the United States Supreme Court in Portneuf-Marsh Canal Co. vs. Brown, 274 U. S. 630, 71 L. Ed. 1243, Was Based Upon Different Facts and Upon Statutes Not Here Involved, and Is Not Controlling in This Case:

25. It is settled law that the statutes and common law of a state and the decisions of its highest court in construing the same, constitute the rule of decision in the Federal Courts.

Section 725, Title 28, United States Code.
Erie R.R. Co. vs. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

26. The assessments levied by the canal company in the Portneuf-Marsh case depended for their validity upon the by-laws of the canal company and the contractual relations between the canal company and the construction company and between the construction company and the settlers. The case did not involve assessments levied under Chapter 19, Title 41, Idaho Code Annotated, but under a provision in the Business Corporation Law, which permitted a corporation, if not prohibited by the by-laws, articles of incorporation or by any contractual relation between the company and its shareholders, to make assessments upon the outstanding stock for the purpose of paying corporate indebtedness. The statute permitted the corporation to sell the stock if the assessment was not paid within the time required. The sale of the stock did not carry with it the land subject to the Carey Act lien, but it separated the water, evidenced by the stock, from the land to which it had been made appurtenant. Taking the water from the land was obviously contrary to both the spirit and the letter of the state and federal laws relating to Carey Act projects, for the lands had been patented to the state on its proof that it had made available a permanent water supply for the reclamation of the land. The Supreme Court construed Section 41-1726, but that construction is contrary to the construction that has been placed upon that section by the Supreme Court of Idaho.

Continental Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

X

Appellee's Right to Water Has Been Lost by Non-User for More Than Five Years:

27. Appellee proved (R.208) and the Court found (R. 106) that no water had been used on appellant's lands from the date they were acquired by appellee and its predecessors in interest, as shown by Exhibit No. 1, attached to the Findings. The Court's Conclusion of Law (VIII, R. 113) that such failure to use had not resulted in abandonment of the water by non-user is contrary to the provision of Section 41-216, Idaho Code Annotated, that "all rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated."

XI

There Is Ample Evidence in the Record as to the Amount Expended by Appellant with Appellee's Approval and on Its Recommendation and Suggestions for the Enlargement of the Irrigation System and the Purchase of Water Rights and Storage Capacity:

Record, pp. 226, 243.

Reporter's typewritten transcript of record on file with Clerk, pp. 153, 154.

ARGUMENT

We deem it unnecessary to state at length before this Court the procedure followed in the promotion

and development of Carey Act irrigation projects in Idaho. That has been fully stated, and many of the provisions of the law construed, in numerous decisions of this Court, including the following:

Twin Falls-Salmon River Land & Water Co. vs. Caldwell, 242 F. 177.
Idaho Irr. Co. vs. Gooding, 285 F. 453.
Twin Falls-Salmon River Land & Water Co. vs. Davis, 267 F. 382.
Twin Falls-Salmon River Land & Water Co. vs. Caldwell, 272 F. 356.
Commonwealth Trust Co. vs. Smith, 273 F. 1.
Glavin vs. Commonwealth Trust Co., 295 F. 103.
Twin Falls-Oakley Land & Water Co. vs. Martens, 271 F. 428.

In the case at bar appellee was the promoting company, then known as the Twin Falls North Side Land & Water Co. As such its stockholders organized, as an affiliated company, the Twin Falls North Side Investment Company, Limited, which, as its name implies, was organized for investment purposes, and it engaged in numerous enterprises, including the building and operating of hotels, the owning of banks, promoting of townsites and selling town lots, etc. (R. 227, 298). These companies were merged into appellee (R. 203-7). Appellant was organized by appellee pursuant to the provisions of the state contract (Pltf's Ex. No. 1, R. 185). Appellee was originally the owner of all the capital stock of appellant, which in turn it

sold to settlers or entrymen on the Carey Act Land, on the basis of one share of stock for each acre of irrigable land (R. 185).

The state contracts specifically provided that upon completion of the irrigation system the same should be transferred to appellant, which should have the management and control thereof, and deliver water to its shareholders who had entered or filed upon the Carey Act land, or acquired water rights in the irrigation system on the basis specified in the state contract (R. 186-187).

In order to avoid throwing the entire burden of maintaining the irrigation system on the settlers who promptly improved and developed their farms and established their homes on the project, and to avoid an undue advantage accruing to those who held their land for speculative purposes and did not proceed with improvement of their farms, and did not live on the project, the Legislature specifically provided in Chapter 19, Title 41, Idaho Code annotated (Sec. 41-1901, set out in the appendix to this brief, originally adopted as Chapter 120, Session Laws 1913, and effective from the date of its approval on March 11, 1913), that operating companies such as appellant, the control of which is vested in those entitled to the use of water from the irrigation system:

> "shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant, regardless of whether water is used by such owner

> or holder, or on or for his land * * * reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company."

Appellee acquired its lands by foreclosure of water contracts, sheriff's deed, or quitclaim deed from the settlers who defaulted in payments under their contracts with appellee, between 1911 and about 1928 (R. 114-133). It is admitted that appellee has paid all assessments levied under the statute to and including 1931; that suits for the foreclosure of the assessments for 1932, 1933, and 1934 are pending in the proper State Court; that appellant filed suit in December, 1937, for the foreclosure of the 1935 and 1936 liens in the proper State Courts; that in such suits appellee can set up any defense which it may have and assert every right which it can assert in the case at bar.

It seems obvious that the principal, if not the sole reason why appellee commenced the present suit in the Federal Court was to avoid a construction by the State Court of the state statutes that determine the rights of both appellee and appellant in the case at bar. Appellee is fully aware that it would only be necessary to try one of the cases pending in the State Court; that when the Supreme Court of the state determines the construction that should be placed on the statute on which appellee relies (Sec. 41-1726) and the statutes under which appellant levied the assessments (Secs. 41-1901, et seq.), it is a simple matter

for the parties to determine what amount, if any, appellee owes on the unpaid assessments, and to proceed accordingly to either cancel the assessments, if appellee prevails, or enter decrees of foreclosure and sell the land if appellant prevails and appellee refuses to pay.

In the case at bar the Trial Court found as follows, with reference to appellant's liens for 1935, 1936, and 1937:

> "That said claim of lien was in all respects in conformity with and as required by Section 41-1903, Idaho Code Annotated" (R. 100, 101, 103).

The record shows that no contest whatever was made on the mechanics used or procedure followed by appellant in acquiring and establishing its lien. The contest was on the construction of the state statutes and as to whether appellee's lands were, by Section 41-1726, exempt from assessments levied by appellant. The subject matter of the suit was the construction of the state statute and as to whether appellant had any right, in the past or in the future to impose assessments on appellee's lands for maintaining and operating the irrigation system.

Appellant pleaded several defenses. We shall first consider the plea in abatement, for, if that be sustained, there is no occasion for the Court passing on any of the other questions presented by the record.

I

The Trial Court Should Have Sustained the Plea in Abatement:
(Specification of Errors Nos. 1 and 10)

It is elementary law that the construction of this statute by the highest Court of the state will be the controlling authority for operating companies in levying assessments. If there should be conflict between the decision of the Federal Court and that of the Supreme Court of the state, the decision of the Federal Court would only settle the question as to the particular landowner who is a party to the suit. As to all other landowners on the same project, the decision of the State Court would control. In the interest of harmony and uniformity in the administration of the law, it would be most unfortunate to have conflicting constructions and decisions on such an important statute. If there were no other reasons for abating the action, we think that in itself would be sufficient for the Federal Court, exercising its discretion under the rule of comity, to refuse to proceed with the case until one of the cases in the State Court has been decided by the Supreme Court of the state.

In this case, however, we submit that the stay of proceedings in the Federal Court on the plea in abatement is more than a matter of discretion. The suits pending in the State Court for foreclosure of appellant's liens for the 1932, 1933, and 1934 assessments are proceedings *in rem*. The statute under which the assessments were levied is a part of appellant's lien and must be construed in order to determine the extent or dignity of the lien. The statute under which appellee claims is a part of its so-called Carey Act

lien. The status of its lands, as to whether they are exempt or not exempt from appellant's assessments, depends on the construction of the state statute under which appellee claims protection. The construction of the state statutes is a part of the subject matter of the forclosure suits.

The Supreme Court of Oregon, in Matlock vs. Matlock, 87 Ore. 307, 170 Pac. 528, held that a divorce proceeding, in so far as it fixes the status of the parties, is a proceeding *in rem*, and that the Court which first acquires jurisdiction is entitled to retain it till final conclusion.

Appellee persuaded the Trial Court to hold that the assessments for 1935, 1936, and 1937 presented a different subject matter, a different *res*, than the foreclosure suits for 1932, 1933, and 1934. We think that contention is wrong. It takes too narrow a view of what is involved in the suits in the State Court and in the case at bar. The procedure for perfecting appellant's lien is inconsequential. There is no controversy as to the date, form, or contents of the liens or statements filed by appellant. The controversy is wholly as to their statutory effect on appellee's lands.

The Foreclosure of the Liens Is a Proceeding in Rem:

Section 41-1907 provides that the procedure for the foreclosure of the lien for assessments shall be substantially the same as the foreclosure of a real estate mortgage; but the foreclosure of a real estate mortgage may also involve the personal liability of a mortgagor or his successor in interest, whereas the lien for such assessments is exclusively against the land.

There is no personal liability for the payment of the lien authorized under Chapter 19, Title 41. The foreclosure is for the purpose of subjecting the land to sale for the payment of the charges embraced in the lien. It matters not whether the owner is a resident or non-resident; the land is subject to the lien and may be sold for the payment of the amount found due thereunder, but no personal judgment can be taken against the owner of the land. In the event judgment is obtained by appellant in the State Court actions, it will be entitled to have the land sold by the Sheriff to satisfy the judgment, and, for the purpose of making the judgment of the State Court effective, that Court is deemed to have at least constructive possession of the lands involved in the State Court action, and the lands, accordingly, are withdrawn from the jurisdiction, supervision or interference of the Federal Court in any action of actions involving the same parties and the same issues.

In the case of Freeman vs. Alderson, 119 U.S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372, the Supreme Court said:

> "Actions in Rem, strictly considered, are proceedings against the property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, * * *."

Beale, in his recent work on the conflict of laws, in discussing this subject says in Section 101.1:

> "The clearest case for the exercise of jurisdiction in rem is that for jurisdiction to determine the title to land."

And in Section 101.2, he says:

> "A lien upon the land may be judicially declared and enforced against a non-resident owner, since it is necessary to affect the land only."

In Heidritter vs. Elizabeth Oil Cloth Co., 112 U.S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729, in discussing the conflict of jurisdiction in an action to foreclose a mechanic's lien brought in the State Court of New Jersey after the property had been seized by an officer of the United States for an alleged offense against its laws and where both actions went to judgment and the property was sold under both judgments, and title was claimed by two different purchasers, the Court said:

> "Indeed so far as the proceedings in question sought to bind the land by enforcing the plaintiff's lien as a specific lien thereon, and to dispose of the premises in satisfaction thereof by a sale, they were substantially in rem, whether there was personal or merely constructive service of process upon the defendant owner. The kind of process and mode of service could be material only with reference to the nature of the judgment. He could
>
> be bound personally only by his coming or being brought personally within the jurisdiction of the Court. But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically of a nature to bind the title. In such cases the land itself

> must be drawn within the jurisdiction of the Court, by some assertion of its control and power over it. This, as we have seen is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

The Court then discusses the matter of comity and conflict of jurisdiction between the two Courts and the rule that prevails in such cases, and adds:

> "That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity and therefore of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that Court which first acquires possession of that dominion which is equivalent draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

Farmers Loan and Trust Co. vs. Lake Street Elevated R. Co., 177 U.S. 51, 44 L. Ed. 667, was a case for the foreclosure of a trust deed in the Federal Court; a suit was thereafter commenced in the State Court and the summons issued by the State Court was served prior to the service of the subpoena of the Federal Court. The Court in its opinion said:

"As between the immediate parties, in a proceeding in rem, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here the process is subsequently duly served, in accordance with the rules of practice of the Court.

"The defendants could not defeat jurisdiction thus acquired, and supplant the case, by bringing suit in another Court and procuring an ex parte injunction seeking to restrain the service of process already issued.

"As, then, the bill of foreclosure had been filed in the Circuit Court of the United States and the jurisdiction of that Court had thus attached before the commencement of the suit in the State Court, it follows upon principle and authority that it was not competent for the State Court to interfere by injunction or otherwise with the proceedings in the Federal Court.

"The possession of the *res* vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other Courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons.

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another Court, but it often applies

> as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where in the progress of the litigation, the Court may be compelled to assume the possession and control of the property to be affected."

The decision perhaps most frequently cited in late years is that of Kline vs. Burke Construction Co., 260 U.S. 226, 67 L. Ed. 226. In that case the Construction Company brought an action in the Federal Court in Arkansas against the petitioners (Kline, et al.) for breach of contract; after the commencement of that action the petitioners, Kline and others, instituted a suit in equity against the Construction Company in a Chancery Court of Arkansas on the same contract and on the bond for its faithful performance, for an accounting and judgment for a large sum alleged to be due because of the abandonment of the contract by the Construction Company. The question arose as to the right of the Federal Court to enjoin the petitioners from prosecuting the action in the State Court, and the right to an injunction turned upon the question as to whether the suits were *in personam* or *in rem.* The Court there announced that the pendency of an action *in personam* in one jurisdiction does not preclude the institution of an action on the same cause in another jurisdiction but that in actions *in rem* neither State nor Federal Courts can exercise jurisdiction over the *res* after the jurisdiction of the Court of the other sovereignty has attached to it. The Court said:

"It is settled that where a Federal Court has first acquired jursidiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal Court the possession or control, actual or potential of the *res*, and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs, and may defeat the jurisdiction of the Federal Court, already attached. The converse of the rule is equally true—that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction."

The Circuit Court of Appeals from the Third Circuit in Morgan Engineering Co. vs. General Castings Co., 177 Fed. 347, held that an action in a State Court of Pennsylvania for the foreclosure of a mechanic's lien brought the *res* within the jurisdiction of the State Court, and the Federal Court was therefore without jurisdiction to proceed with the later action commenced in the Federal Court. The opinion concludes with this statement:

"We are, therefore, of the opinion that, on the filing of this mechanic's lien in the State Court by the Morgan Engineering Company, that Court acquired jurisdiction of the subject-matter there-

of and the Circuit Court properly declined to oust said jurisdiction by issuing a Writ of Scire Facias on the lien."

In Mound City Co. vs. Castleman, et al., 177 Fed. 510, the Circuit Court was considering a suit to partition land in the state of Missouri. Prior to the completion of service of summons on the various defendants a suit in equity was commenced in the United States Court. In discussing the priority of the suits and the jurisdiction of the Courts, the Court said:

> "It is a well-settled rule of law that the jurisdiction of the State Court over the res, i.e., the subject-matter of the partition of this land, was exclusive of that of every other Court subsequently undertaking to exercise such jurisdiction; this for the obvious reason that as the judgment to be rendered by the Court first in time to be effective must operate upon the land itself, the control and possession of which is essential to accomplish the very ends of the proceeding. (Citing authorities.) It is not essential to such exlusive jurisdiction that there should have been any actual seizure or specific lien fixed upon the land."

See also:

Hirsch vs. Independent Steel Co., 196 Fed. 104;
Dennison Brick & Tile Co. vs. Chicago Trust Co., 286 Fed. 818;
Covell vs. Heyman, 111 U.S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390.

The Circuit Court of Appeals of the Eighth Circuit in Boston vs. Acme Mines Corp. vs. Salina Canyon Coal Co., 3 Fed. (2nd) 729, held that a suit in the State Court to quiet title to coal lands in Utah was an action *in rem* and that the Federal Court was without jurisdiction to proceed with a later suit brought in that Court involving the same subject-matter and while the state suit was pending.

To the same effect is the decision in the case of Palmer vs. Texas, 212 U.S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

See also:

Hughes Federal Practice, Vol. I, p. 262, par. 336, on the subject "Conflict of Jurisdiction in suits in rem."

C.T.C. Investment Co. vs. Daniel Boone Coal Corp., 58 Fed. (2nd) 305;

Harkin vs. Brundage, 276 U.S. 36, 48 Sup. Ct. 268, 72 L. Ed. 457;

Guardian Trust Co. vs. Kansas City Southern Railroad Co., 146 Fed. 337, 76 C.C.A. 615.

Relying upon the foregoing authorities, it is our contention that the actions in State Court described in Appellant's Second Affirmative Defense (R. 50-52) are actions *in rem* or *quasi in rem*, and the State Court having acquired jurisdiction of the *res* by virtue of the commencement of those actions, in December of 1934, 1935, and 1936, respectively, has a right to continue its jurisdiction over the lands to the exclusion of any interference by the Federal Court, and the Court below should have respected the right of the State Court to

such exclusive jurisdiction and the plea in abatement should have been sustained.

II

Appellee's Lands Are Not Exempt From Assessments Levied by Appellant:

(Specification of Errors No. 3)

The Court in its Conclusions of Law (IV, R. 111), and in its decree (Par. II, R. 135), held and decreed that the lands of appellee, during the year 1935 and the years subsequent thereto, were "and are now exempt from the assessment liens of the defendant company." That is obviously the gist of the Court's decision and the basis upon which the decree rests.

No *exemption* from assessments is either expressed in or implied by Section 41-1726, on which appellee relies, and exemption is clearly contrary to both the letter and the spirit of Sections 41-1901, et seq., under which appellant's assessments were levied. It is therein expressly provided that a corporation like appellant,

> "shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; * * * reasonable tolls, assessemnts and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, * * * and such company * * * shall have a first and prior lien, *except as to the lien of taxes* upon the land to which such water and water rights are appurtenant." (Our italics.)

This statute is so positive, direct and mandatory that the Trial Court said in its opinion (R. 164):

> "The defendant was required under the law to spread the assessments ratably over all the lands of the project regardless of the contention of the plaintiff * * * that its lands were exempt or not subject to assessment."

It is settled law that an intention on the part of the Legislature to grant an exemption from assessments or taxes must be expressed in clear and unmistakable terms. When a privilege or exemption from assessments is claimed under a statute, it is to be construed strictly against the property owner. Exemptions are never presumed. The right to exemption can not be made out by inferences or implications but must appear beyond reasonable doubt from the language of the statute.

2 Cooley on Taxation (4th Ed.), Sec. 672.
Board of Directors vs. Board of Review, 248 Ill. 590, 94 N.E. 153.
Honolulu Rapid Tr. & L. Co. vs. Wilder, 211 U.S. 137, 53 L. Ed. 121.

The rule stated above has been applied by the Supreme Court of Idaho to the statute under which appellee claims protection. That Court has held that the lien for taxes is superior to the so-called Carey Act lien, even though there is no express provision in the revenue statutes to that effect.

Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458.

Assessments such as were levied by appellant under the express provisions of the statutes are in the nature of taxes and the law as to taxes applies to such assessments, except as otherwise expressly provided in the statutes.

61 C.J., pp. 68-75;
67 C.J., p. 1357.

Section 41-1901 makes but one exception to the priority of appellant's lien and that is "*except as to the lien of taxes.*" That clearly eliminates appellee's claim. The assessment statute is most comprehensive and complete. It subordinates liens of every nature, except for taxes.

We think appellee's claim to exemption is wholly without merit and not supported by any authority involving the construction of a statute like Section 41-1901.

III

Appellee's Alleged Carey Act Lien Was Merged in Its Legal Title:

Appellee, whether it acquired title through foreclosure or by quitclaim deed from the landowners who defaulted in their payments, took title in full satisfaction of the lien created by the contract, or the so-called Carey Act lien. Mr. Parry testified:

> "No attempt has been made to collect the unpaid balances on these water contracts, and the settler was not expected to pay further upon them. In foreclosing the water contracts these contracts were put in evidence in the case, and the usual

form of decree of foreclosure was obtained, after which order of sale issued and the usual sale was held. Judgment was taken in the aggregate amount of the unpaid principal with interest to the date of judgment and court costs. Taxes were not included in the judgment, and no taxes had ever been paid prior to the acquisition of the lands by foreclosure" (R. 207-208).

To further illustrate the general procedure, an abstract of title was introduced (Deft's. Ex. No. 37, R. 228). A complaint in foreclosure is set out in the abstract (R. 229-232) from which it appears that the foreclosing plaintiff declared the whole amount due, principal and interest, and added to that amount *maintenance charges* and interest thereon paid by the plaintiff—appellee—in that case aggregating $69.60 (R. 231). Plaintiff prayed for the usual decree in a foreclosure suit (R. 232), and the usual form of decree was entered (R. 233-234).

The sheriff's certificate of sale recites that the property was sold to the foreclosing plaintiff who bid therefor the full amount of principal, interest, *accumulated maintenance charges, interest thereon,* court costs, sheriff's costs and the sheriff's commission (R. 235-236), and thereupon a sheriff's deed was issued (R. 236) to the foreclosing plaintiff, who in that case was the trustee for the bondholders. The land involved in that foreclosure consisted of two forty-acre tracts embraced in water contract number 1102, set out at the top of page 115 of Exhibit I attached to the Court's Findings of Fact, and it will be noted that the amount given in

the column headed "Amount due at date of deed" is the amount for which the property was bid in at the foreclosure sale.

The record clearly shows that the land and water rights, with the settler's improvements, were accepted or bid in for the full amount of the judgment, and *that the debt was accordingly paid.* We may add that appellee has never contended otherwise. Under such state of facts, is it possible that appellee may still have a lien which it can hold indefinitely as a shield for the protection of the legal title which it thus acquired? The public records show the contracts and liens were paid by the sale of the land. There is no longer any record lien and nothing to show the land is not worth the amount of the bid, or why appellee bid more than the land was worth. The release of the lien is not by inference or implication but by appellee's overt and intentional act.

It is clear from the authorities that there can be no secret intention to keep a satisfied mortgage lien alive after the legal title has been acquired.

When the mortgage lien has not been satisfied and the legal title is vested in the mortgagee, the rule is as stated in 10 R.C.L., p. 667:

> "When the circumstances under which merger ordinarily takes place are shown, the burden rests upon him who alleges that there was no merger to prove a contrary intention or to prove facts and circumstances from which such an intention will be presumed."

In addition to the above, appellee's actions and conduct for about twenty years in paying assessments for

maintenance and operation on the property, and in selling or negotiating for the sale of the land and dealing with it *as absolute owner and not as mortgagee or lien claimant,* would seem to be conclusive against its claim of intention to keep its lien alive.

In 41 C.J., p. 775, the rule is stated thus:

> "Ordinarily, the purchase or acquisition of the equity of redemption in mortgaged premises by the mortgagee results in a merger of the two estates, vesting the mortgagee with the complete title, and putting an end to his rights or title under the mortgage. But to constitute a merger, the two estates or interests must unite in the same person in the same right, and the estate acquired must be nothing less than the complete legal title in fee, unencumbered with conditions or restrictive agreements, and not liable to be defeated because of fraud or undue influence, or on other grounds."

The only exception to the rule is where there are intervening liens or encumbrances. The rule in such cases is stated in 41 C.J., page 780, as follows:

> "Where necessary to enable the mortgagee to defend his rights under his mortgage against intervening liens of third persons, a merger will not be held to have resulted if his intention to that effect is shown, or if there is nothing to rebut the presumption that his intention corresponded with his interest; and so if he was ignorant of the existence of such intervening liens or encumbrances

> a merger will be prevented. A merger, however, has been held to result where the conveyance to the mortgagee results in a satisfaction of the mortgage debt and cancellation of the mortgage and the evidence clearly shows that to be the mortgagee's intention and that he knew at the time of the intervening judgments."

To the same effect is the rule as laid down in Thompson on "Real Property," Sec. 4680, et seq. In 2 Jones on "Mortgages" (8th Ed.), Sec. 1080, the text says:

> "In law a merger always takes place when a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The lesser estate is annihilated or merged in the greater."

In the case at bar there are no "intervening liens." The assessments on which defendant relies were levied long after plaintiff and its predecessors in interest acquired the legal title and long after the merger occurred.

When appellee foreclosed its lien, the latter was merged in the decree or judgment. The lien was extinguished by the decree and from thence on the decree became the measure of appellee's rights, and the sale satisfied the judgment.

The Supreme Court of Tennessee, in Henson vs. Henson, 268 S.W. 378, 37 A.L.R. 1131, 1136, in discussing the extinguishment of liens, says:

> "It is elementary that an extinguishment of the debt, *ipso facto*, discharges the lien to secure the same."

In Jones on Mortgages (8th Ed.), Vol. 2, p. 694, Par. 1216, the author says:

> "Generally upon a foreclosure sale of the property the mortgage debt is extinguished as to the amount of the purchase money, whether the sale be under a power or by a decree of a Court of Equity in a foreclosure suit, or upon a judgment for the debt. * * * If, upon a foreclosure sale duly made, the full amount of the mortgage debt, together with the expenses of the sale, be received, the mortgage debt is paid; * * *
>
> * * * * * * * * *
>
> "A foreclosure sale properly made, whether under a power or by decree of Court, discharges the mortgage lien if the whole estate be sold."

In the case of Shaner vs. Rathdrum State Bank, 29 Ida. 576, 161 Pac. 90, the Supreme Court of Idaho, among other things, said:

> "It is a well established rule of law that payment of an indebtedness may be made by the transfer to the mortgagee of the mortgaged premises. * * * A mortgage is an incident of the debt, and without obligation or liability, there is nothing to secure, consequently there can be no mortgage."

IV

If Appellee Has Any Lien Under Section 41-1726, Such Lien Is Subject and Subordinate to Appellant's Lien Under Chapter 19, Title 41.

[Specification of Errors Nos. 2, 4, 13, 14(a), (c), (d), (e)]

For the reasons hereinbefore stated, we submit that

appellee has no lien supported by Section 41-1726. Whatever lien appellee may at one time have had was merged with the legal title and fully satisfied and discharged. We note, however, that the Court apparently assumed that appellee was not the absolute owner of the lands in question, for it reached the conclusion that appellant's liens for the 1936 and 1937 assessments "are binding upon certain excess proceeds from the sale" of the lands (R. 111). And in Conclusion VI (R. 113) the Court further concludes that in case appellee shall sell any of the lands,

> "for an amount in excess of the sum shown as to such tract or parcel under the column headed 'Amount due at date of deed,' plus the further sum paid out for taxes by plaintiff thereon, which is shown opposite such tract under that column in 'Exhibit1 ' headed 'Taxes paid,' then the assessments levied by defendant for the years 1936 and 1937 * * * shall constitute a lien upon any excess moneys so received by plaintiff * * *."

A provision to the above effect was inserted in the decree (Par. IV, R. 137).

The foregoing provisions imply a qualified title in appellee and appear to be an attempt to give recognition to something in the nature of a lien in appellant. The provisions are obviously without any value whatsoever and directly contrary to the statute which gave appellant a lien on the land and water and not on the "moneys" which appellee may some time receive from the sale of the land. The value of the above provisions

is further depreciated or entirely annulled by the provision in Paragraph VIII of the decree (R. 142), that

> "upon application of any person desiring to purchase any of said parcels of property * * * at a price not less than the aggregate of the sums shown opposite the description of such parcel in said Exhibit (1), * * * *plaintiff shall sell the same to such applicant at such price* * * *." (Our italics.)

The Court thereby requires appellee to sell the land to the first person who offers to buy for the amount due appellee. Obviously, appellant's lien on the excess proceeds is only an illusion.

In contrast with the provision made in the decree in this case for appellant's protection, we desire to refer to the decisions of the Supreme Court of Idaho, as to the nature of the lien of assessments levied under Section 41-1901:

In the case of Carlson-Lusk Hardware Company vs. Kammann, 39 Ida. 654, 229 Pac. 85, the Court considered Chapter 18 and Chapter 19 of Title 41, Idaho Code Annotated, being Chapters 137 and 138 of the former Compiled Statutes. The Carlson-Lusk Hardware Company sought to foreclose a farm mortgage and it made the landowner and the North Side Canal Company—appellant here—parties defendant. The Canal Company set up its assessment lien but the proof in the case was such that the Court could not determine whether the canal company claimed a lien under what is now Chapter 18 or under Chapter 19,

Title 41. Referring to what is now Chapter 19, the Court said:

> "This chapter provides that the lien of the operating company shall be a first and prior lien, except as to the lien of taxes," * * *

Referring to Chapter 137, which applies to companies not controlled exclusively by the landowners, and which was intended to cover Carey Act projects before the completion of the construction company's contract and the turning over of the project to the operating company for operation, the Court says:

> "But this chapter (now Chapter 18) does not provide that such lien shall be prior to others then existing."

Again the Court says:

> "In the absence of express provision, a lien created by statute is subsequent to other liens which are prior in time * * *
>
> "The Legislature therefore has provided that in case of a Carey Act operating company which is actually controlled by the water users themselves, the lien of maintenance and operation assessments is under C.S., Chap. 138 (now Chapter 19) prior to all other liens save taxes; but that in case of a Carey Act operating company which is not so controlled by the water users and other stockholders, the lien of its assessments, under C.S., Chap. 137 (now Chapter 18) does not have priority over pre-existing liens."

In other words, the Court held that Sec. 41-1901 should be enforced according to its terms, and that the lien was prior to all liens except taxes.

Again the same Court, in Federal Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364, held that the lien under Chapter 19 of Title 41 was prior and superior to the mortgage held by the Land Bank, and recorded prior to the levy of the assessment. In Sanderson vs. Salmon River Canal Co., 45 Ida. 244, 263 Pac. 32, the Court further held that the assessment lien did not impair the obligation of contracts as to holders of liens prior in time to the levy of the assessment.

Whenever the question has come before the Idaho Court, it has construed Chap. 19, Title 41, as authorizing a lien prior to all other liens, except the lien for taxes.

Appellee does not rely upon a lien created by Sec. 41-1726, but upon the lien created by the water Contracts (Ex. A to its complaint, R. 21).

The Trial Court found (R. 88) that the water contracts "to the extent of the several amounts owing and unpaid thereon, respectively constituted a lien upon the lands and shares of stock in each severally described," and again, on page 89, the Court refers to the foreclosure proceedings for the enforcement and foreclosure of the liens created by the water contracts.

The water contract itself (R. 26) provides that the "purchaser does hereby grant, assign, transfer and set over by way of mortgage, or pledge to the company to secure the payments of the amounts due and to become due on the purchase price * * * any and

all interest, and all rights which he now has or which may hereafter accrue to him * * * for the purchase of the lands to which the water rights * * * are dedicated," and further that where he obtains legal title "he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust * * * which * * * shall be first lien upon the lands so mortgaged, superior to any and every encumbrance in favor of any persons whomsoever" (R. 27), thus showing clearly that the parties contemplated a mortgage lien, and nothing more.

Sec. 41-1726, in describing the lien which may be created on the Carey Act lands, says:

> *"Said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land."*

The language on its face seems too clear to require construction, and the Supreme Court of Idaho has specifically held that it means exactly what it says. In Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458, the Court was required to determine whether such lien was prior or subordinate to the lien for taxes. Referring to this section the Court says:

> "Under C.S., Sec. 3019 (now 41-1726) the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land and this is not a limitation upon the power of the sovereign to create a lien. A lien for taxes created

under the provisions of C.S., Sec. 3097, supra, is not one created by the owner and possessor of the land but by the sovereign."

"It does not follow that because the legislature failed to expressly declare that a lien for taxes is superior and prior to all other liens that such a lien should be subordinate" * * *

The Legislature, in Chapter 19, Title 41, did not leave to implication or construction the priority of the lien for assessments, but it expressly provided that such lien was prior to all other liens except the lien of taxes.

We have, therefore, a clear and positive construction by the Supreme Court of Idaho of the statutes under which appellant claims and under which appellee claims, and that construction is directly contrary to the conclusion reached by the Court below.

It may be argued that the lien under Sec. 41-1726 does not afford proper protection against involuntary liens, such as judgments and attachments based on unsecured indebtedness of the settler. That argument is without force because Sec. 41-1727 provides that the water contract "upon which the aforesaid lien is founded, shall be recorded in the office of the recorder of the county where said land is situated," and section 41-1728 provides that upon default the holder of the contract "may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right." These statutes were originally all in one section, and they afford full protection to the construction company.

It has been an established public policy in the State of Idaho for upwards of 44 years that an irrigation company shall have a prior lien on land for water service. That statute was in force before the enactment of what is now Sec. 41-1726. The statute referred to is what is now Sec. 41-806, Idaho Code Annotated. The Supreme Court of Idaho, in Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322, and in Blaine County Canal Co. vs. Hansen, 49 Ida. 649, 292 Pac. 240, held that this statute applied to Carey Act operating companies and was available for their use. From the time of the adoption of this statute, all persons taking liens or mortgages on irrigated agricultural lands have been charged with notice of the fact that the laws of the state gave to the canal company a prior lien for the water used in the production of crops.

The Courts have held that the remedy under Sec. 41-1901, et seq., and under Sec. 41-806, are cumulative and a canal company may adopt and use either method. Under Sec. 41-806, however, it is necessary to record separate notices of lien for each individual and to foreclose in separate suits, and it only authorizes a lien for water actually delivered and used on the land. This led to the adoption of Chapter 19 of Title 41, which authorizes a lien, whether water be used or not, and which permits one claim of lien to be filed for all delinquent assessments, and permits the foreclosure of all liens in one suit. The later statute simplifies the procedure and reduces the expense.

Irrigation companies like appellant are engaged in an important public service recognized by numerous

state statutes. There is no constitutional inhibition against the Legislature vesting in such *quasi* public corporations the power to levy assessments on the lands within the project for the maintenance and operation of these large irrigation systems, constructed under state and federal regulations for the reclamation of the public domain.

Counsel for appellee have at times contended that appellee had a purchase money mortgage as if it had been the owner of the land and water before the contract with the settler was executed. That contention is without merit.

By numerous decisions of the State and Federal Courts it has been held, and is now firmly settled, that appellee was only a construction company; that the water appropriated for the project was not appellee's private property, but it was given a water permit *in trust* for the future settlers; that it served only as a conduit for transferring right to the use of water from the state to the settler; that the water evidenced by the permit was dedicated by the state to the entire project for the reclamation of the lands donated to the state when it made proof of their reclamation. Sec. 41-1726 merely authorizes a lien through which appellee may reimburse itself for the cost of constructing the irrigation works. The title to the land came from the federal government to the state and from the state to the settler and appellee had no interest whatever in the land until the settler executed a contract giving it a lien thereon. Appellee was not allowed to make any profit through the sale of water, that was the property of the state. Appellee merely

had a franchise from the state for the construction of irrigation works, and for the cost of constructing the works it was permitted to collect from the settlers the amounts specified in the state contracts.

A fairly comprehensive review of the law and public policy on this subject is set out in the case of State and Robert Rayl vs. Twin Falls-Salmon River Land and Water Co., 30 Ida. 41, 166 Pac. 220. On page 58 of the Idaho report the Court said:

> "The Construction Company was permitted, under the law, to appropriate the water, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system constructed by it;"

and on page 64:

> "The company building the works is a construction company only. It constructs the works and payment to it must be made from the lien fixed by law upon the land."

To the same effect are statements on pages 61, 63, 65, 68, and 77, and in:

> Adams vs. Twin Falls-Oakley Land and Water Co., 29 Ida. 357, 161 Pac. 322;
> State vs. Twin Falls Canal Company, 21 Ida. 410, 419, and 421, 121 Pac. 1039;
> Vinyard vs. North Side Canal Co., 38 Ida. 73, 82, 223 Pac. 1072;
> Idaho Irr. Co. vs. Pew, 26 Ida. 272, 141 Pac. 1099;

Idaho Irr. Co. vs. Lincoln County, 28 Ida. 98, 152 Pac. 1058.

The water is the property of the state.

Walbridge vs. Robinson, 22 Ida. 236, 125 Pac. 812.

We repeat, therefore, that appellee did not, until it received either a sheriff's deed or a deed from the settlers, own either the land or the water, and it accordingly does not have either a purchase money mortgage or a vendor's lien thereon.

There is no basis for the contention which appellee has at times made, that when it foreclosed its lien and purchased the land and water at foreclosure sale, or by quitclaim deed from the settlers, it again assumed the status or now occupies the same position which it did before the land was entered and the water rights sold to the settlers. That contention is erroneous in fact and unsound in law.

V

Appellee Is Estopped from Contesting Validity of Assessments Levied by Appellant:

(Specifications of Errors Nos. 5, 7, and 12)

The Court found (R. 107-108) that R. E. Shepherd, now president of appellee, from the year 1913 to December, 1936, was in charge of the interests of appellee and the Bondholders' Committee on the North Side Project; that from January 2, 1917, until May 1, 1920, he was president of appellant and was manager of appellant from about September 20, 1921, until March 31, 1937; that he assisted in preparing appellant's

annual budget of receipts and expenses, and in determining the amount of money required for carrying on appellant's business; that he attended the meetings of the board of directors where the budget was examined and discussed and assessments levied under Chapter 19, Title 41; that he advised and recommended such betterments and improvements as were made in the irrigation system; that he advised and recommended the leasing and purchasing of additional water; that he made no objections to the manner in which appellant's business was conducted or the amount of assessments levied; also (R. 106) that appellants paid all annual assessments levied against its lands to and including the year 1931.

The Court found (R. 108) that in all such matters said R. E. Shepherd "was acting as an agent and officer of defendant and on its behalf and not as agent or officer or on behalf of plaintiff or the said bondholders or any of their said agencies; that none of the foregoing facts nor any acts or conduct of said R. E. Shepherd constitute any estoppel against plaintiff's claims in this suit." Conclusion of Law No. VII (R. 113) is to the same effect.

The finding and conclusion of the Court that all of Mr. Shepherd's statements and acts were made as an officer of appellant and had no relation to and did not concern or affect the bondholders' committee or appellee, whose agent and representative he was on the project, and because of which he was elected to an official position in appellant's organization, is clearly too narrow a view of the law of estoppel and agency.

Mr. Hurlebaus testified (R. 225-227) that Mr. Shep-

herd attended not only the meetings of the directors of appellant but of its stockholders, and made recommendations to the directors and stockholders concerning the improvements on the system and urged the purchase and rental of additional water; that on his recommendations appellant contracted an obligation of $353,724.99 on new construction on what is known as the Gooding Canal and certain syphons; rented 150,000 acre feet of storage space in American Falls Reservoir at 12½ cents per acre foot per year for 10 years, making an annual cost of $18,750.00, or $187,500.00 for the period; purchased 20,000 acre feet of storage space in the same reservoir at a cost of $127,727.77, making in the aggregate obligations totaling $668,962.76, all of which was expended for the purpose of obtaining more water for appellee's lands and the lands of other shareholders and for providing a better water service and a more dependable water supply.

Mr. Heiss testified at length to the recommendations and activities of Mr. Shepherd regarding the above matters and other changes and improvements in the system. Referring to the expenditures made and the assessments levied by appellant, Mr. Heiss testified (R. 246) there were no protests ever lodged by Mr. Shepherd or by any representative of the bondholders, or by the Investment Company, the Land and Water Company, or by the Idaho Farms Company. There was no conflict in the evidence on these matters.

We note also, for the bearing it may have on other points in the case which we shall hereafter have occasion to refer to, that there was at all times the closest

cooperation and interlocking management on the part of appellee and appellant. As to that Mr. Heiss testified (R. 246):

> "Up until just a couple of years ago the offices of the Investment Company and the Land and Water Company and the defendant company were all in the basement of the hotel in Jerome. The Canal Company also maintained another office elsewhere up the street, where it collected the maintenance. The employees and officials of these three companies had desks in different places in one large room in the basement of the hotel, with the exception that Mr. Shepherd had a private room for himself."
>
> "Mr. Shepherd was the manager of our company and was also the manager of the other two companies. The defendant's secretary was in the same office, and he was also affiliated with the other companies. And naturally they all worked together."

Mr. Stocking, the water master of appellant, testified at some length as to Mr. Shepherd's recommendations for improvements in the system and the purchase of more water (R. 262-266).

The evidence is undisputed that until the complaint was filed in the case at bar appellee had not questioned the right of appellant to levy assessments against appellee's lands and collect them as provided by law. Appellee first defaulted in the payment of its assessments in 1932. Since then appellant, on the recommendation of Mr. Shepherd, purchased the 20,000 acre

feet of storage space at a cost of $127,737.77, and it has paid out annually, for the rental of water, $18,750. At the beginning of 1932, it owed $175,000 on the obligation for the construction of the Gooding Canal (R. 226-243 and typewritten transcript on file with Clerk, pp. 153 and 154). At the beginning of 1935 it owed $135,000 on the Gooding Canal and nearly $84,000 on the cost of the 20,000 acre feet of storage space (R. 226).

Appellee has for upwards of 20 years acquiesced in the construction of the assessment statute and encouraged the incurring of obligations which could only be paid by assessments under that statute. Without such improvements the whole distribution system would rapidly deteriorate and destroy the value of the water rights of shareholders such as appellee.

In 12 Corpus Juris, page 769, the law as to a waiver of legal rights by acqiescence in the construction of a statute is stated as follows:

> "A person may, by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objections had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detri-

ment of others, or who asserts rights under it, may not question its constitutionality."

To the same effect are:

21 C.J., Sec. 247, under Estoppel;
Bacon vs. Rice, 14 Idaho 107, 119, 93 Pac. 511.
Marine Iron Works vs. Weiss (C.C.A. 5), 148 Fed. 145, 153.

In 21 Corpus Juris, page 1216, Section 221, this text further says:

"Acquiescence as a defense has, generally speaking, a dual nature; it may, upon the one hand, rest upon the principle of ratification, and be denominated 'implied ratification,' or, upon the other hand, rest upon the principle of estoppel, and be denominated 'equitable estoppel.' Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. And this is so regardless of the particular intent of the party whose acquiescence induces action."

In 1 Cooley on Constitutional Limitations (8thEd.), page 368, the author says:

"There are cases where a law in its application to a particular case must be sustained, because the party who makes the objection has, by prior ac-

> tion, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizens, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

The Court of Appeals of the State of New York, in the Matter of the Application of Cooper, Mayor of New York City, 93 N.Y. 507, said:

> "It is very well settled that a party may waive a statute and even a constitutional provision made for his benefit, and that having once done so he can not afterward ask for its protection."

This has been reaffirmed repeatedly by the New York Courts. See:

> Sentenis vs. Ladew, 140 N.Y. 463, 35 N.E. 650;
> Mayor, Etc. vs. Manhattan Ry. Co., 143 N.Y. 1, 26, 37 N.E. 494;
> Hull vs. Hull, 158 N.Y.S. 743.

In addition to appellee's acquiescence in the construction of the statute, it has by its acts and the conduct and statements of its officers, induced appellant to spread its assessments over appellee's lands and to assume obligations aggregating upwards of $669,000. These improvements and purchase of additional water have added materially to the value of appellee's stock and to the betterment of its water rights. It would be unconscionable and inequitable to permit appellant to reap such benefits at the expense of the other stockholders.

The rule of estoppel should have been applied to appellant, first, because it has waived its right under the statute to urge the construction for which it now contends, and, second, it has by its acts and its conduct led appellant into incurring large financial obligations at a time and under conditions which led appellant to believe that appellee would pay its full share of such obligations.

The statement of the Trial Court that all such representations were made by Mr. Shepherd as manager or as an officer of appellant would seem to be thoroughly unsound in view of the record. Mr. Shepherd was first and at all times the agent and officer of appellee and the Bondholders' Committee. The Court must assume he acted in good faith and that he did not take advantage of his dual position to obtain an advantage for appellee at the expense of appellant. If appellee did not approve the assessments it was Mr. Shepherd's duty as its officer, having full knowledge of the facts, to protest or so advise the officers or directors of appellant. Neither the law of corporations nor the law of agency furnishes a shield of protection to appellee.

VI

One Can Not in a Suit to Quiet Title Based on Allegations of Ownership, Convert the Action into One to Determine Priorities of Liens, without Any Supporting Allegations in the Complaint:

(Specification of Error No. 14 [f])

Appellee alleged (R. 16) that it was the owner in possession and entitled to the possession of all the property described in Exhibit 1 attached to the Findings of Fact. It did not allege or suggest that it brought

the suit as a lienholder and that it merely sought to determine the relative priority of its lien and appellant's lien.

The Trial Court stated in its opinion (R. 149) that it was a suit to quiet title and not to foreclose appellee's lien. But appellee did not rest its case on its legal title but upon a claimed exemption, based on the lien authorized under Sec. 41-1726. The proper procedure to determine the priority of two liens is in the foreclosure suit on one or the other of the liens involved.

VII

The Trial Court Erroneously Rejected Appellant's Evidence That It Had Protected Its Lien for 1935 Assessment by Bringing Foreclosure Suits in the State District Court:

(Specifications of Errors 9, 14 [b], and 16)

The Court found (Finding XVI, R. 104) that no evidence was admitted or received by the Court to show that any proceedings were commenced by the appellant in a proper Court to enforce the liens claimed by it for assessments for the years 1935, 1936, or 1937 or any of said liens against appellee's property. Said liens and the actions based on the 1935 and 1936 liens are described in paragraphs IV to XIII, inclusive, of appellant's answer (R. 40 to 46).

In its Conclusions of Law, the Court concluded that the lien for maintenance and operation for 1935 no longer binds any of appellee's property (F. III, R. 110). In its decree the Court decreed that the said lien for 1935 maintenance and operation was not binding upon appellee's lands and that appellee's lands may be sold free and clear of said lien (Decree, I and IV, R. 134, 136).

At the trial, Exhibits 33 and 34 were offered in evidence; the Court refused to admit the Exhibits over the objection of appellee (R. 219), and on motion of counsel for appellee the Court also struck the portion of Wayne Barclay's testimony to the effect that similar suits had been commenced in Gooding County, Idaho (R. 216, 217). It is our view that the actions commenced for the foreclosure of the liens for maintenance and operation costs for the years 1935 and 1936 had been properly commenced in the proper Courts. Section 41-1905 limits the time for the commencement of an action to foreclose the lien to two years.

Section 41-1907 provides for the foreclosure of liens for maintenance and operation costs by way of a civil action in the State District Courts and that the foreclosure action shall be the same as the foreclosure of a first real estate mortgage.

Section 5-401 provides that actions for the foreclosure of a mortgage on real property must be tried in the county in which the subject of the action or some part thereof is situated.

Under the provisions of Section 9-101:

> "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. * * *"

Counsel for appellee argued to the Court that inasmuch as the actions to foreclose the 1935 and 1936 liens had been commenced in the State Courts after the commencement of this action in the Federal Court,

said State Court actions had not been commenced in a "proper court" (R. 218); that by the commencement of this action in the Federal Court, the Federal Court had acquired exclusive jurisdiction over the 1935 and 1936 liens and that actions to foreclose the same could not thereafter be legally commenced in any Court other than the Federal Court. Judge Cavanah accepted that theory and accordingly, as above stated, held that the actions to foreclose the 1935 and 1936 liens had not been properly commenced, and further that no actions for the foreclosure of those liens were then pending in the State Courts.

Appellant had not been enjoined from commencing the suits in the State Courts, and, assuming that this action was properly commenced in the Federal Court, it is our view that its pendency, of itself, is not a bar to the commencement of the actions to foreclose those liens in the State Courts. (See Note 65 in 15 C.J. 1163.)

15 C.J. 1152, Sec. 631, states the rule as follows:

> "Except as judgments of State Courts are subject to review by the Federal Supreme Court, or as actions originally brought in a State Court may be removed to a Federal Court, the Courts of the United States and of the various states are independent of each other, and the pendency of a suit in one of such Courts is not a bar to a suit in another such Court involving the same controversy, although as a matter of comity one of such Courts will not ordinarily determine a controversy of which another of such Courts has previously obtained jurisdiction."

The rule that where the same matter may be brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain jurisdiction until the controversy is fully determined does not go so far as to make the subsequent commencement of an action in another Court a nullity. It has never been extended that far. The rule of comity is not self-executing. It is not automatic. The rule must be invoked before it becomes effective. Where an action has been commenced in one Court and subsequent thereto another action involving the same issues and the same parties is commenced in another Court, and the rule of comity is then invoked, it is not put in operation retroactively so as to make the commencement of the second action illegal. The proper application of the rule would be for the Court in which the second action is commenced to abate said action until the Court first acquiring jurisdiction had an opportunity to fully adjudicate the issues of the case so as to avoid any unseemly conflict between the two Courts, or the Court first acquiring jurisdiction may enjoin the party from prosecuting the action in the other Court. See Marks vs. Marks, 75 Fed. 321. But such application or operation of the rule would not justify a Federal Court in finding that an action subsequently commenced in the State Court has not been properly commenced, or in finding that such actions were not then pending in the State Court.

The Idaho statutes having given the state district courts jurisdiction of suits for the foreclosure of liens for maintenance and operation assessments and the foreclosure complaints having been filed in the district

courts of Gooding and Jerome counties within two years from the date of filing the claims of liens for 1935 and 1936 delinquent assessments and before the rule of comity was invoked, the liens are kept alive and effective by such suits. Accordingly, Witness Wayne Barclay should have been permitted to testify concerning said suits, and the Court erred in finding that proceedings had not been commenced in a proper Court to foreclose said liens, and it likewise erred in concluding that the 1935 lien no longer binds any of appellee's lands, and it erred in decreeing that said lands may be sold free and clear of said lien.

Section 20 of Article V of the Idaho Constitution provides that:

> "SEC. 20. JURISDICTION OF DISTRICT COURT.—The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

Obviously, under the Constitution and the statutes of the state, the District Court had jurisdiction of the parties and of the subject matter, and it was the right, if not the duty, of appellant to commence its action in the District Court for the county in which the land is situated. The decision of the Trial Court in refusing to admit the evidence as to the commencement of these actions was, in effect, a nullification of the provisions of both the statutes and the Constitution. Appellant's lien for 1935 aggregated $10,092.36 (R. 236). This amount was stricken from its claim by the Court's ruling.

We submit that the actions were properly com-

menced in the State Court and that the proper procedure for appellee would have been to either remove the actions to the Federal Court, or obtain an order abating the proceedings in the State Court, or an order in the Federal Court enjoining appellant from prosecuting the actions if they involved the same subject matter as was involved in the suit in the Federal Court.

VIII

There Is No Authority in Law for Permitting a Water User to Offset Statutory Assessments for Maintenance and Operation by a Showing That He Did Not Use His Water, and That This Resulted in an Advantage to Other Stockholders.

(Specification of Errors Nos. 8 and 15)

The Court found (XVIII, R. 105, 106) that appellee had not used the water on its lands during any of the years for which the maintenance assessments are involved in this case, and that appellant and its stockholders had used such water and derived benefit therefrom and that such benefit would be an offset against the assessments. On the same theory it overruled appellant's objections to appellee's questions for the purpose of bringing out on cross-examination of appellant's witnesses, the extent to which other stockholders had used the water which appellee did not desire to use on its lands.

We think the finding of the Court and the ruling on the evidence (R. 256-257) are not only wrong as a matter of general law, but are directly contrary to the express provisions of Sec. 41-1901, et seq., under which appellant levied its assessments.

The statute expressly provides that the assessments shall be levied and paid, regardless of whether water be used or not. If the Court's ruling be correct, then every water user can evade the payment of assessments when he does not use his water by merely showing that the water may have been distributed to other stockholders and that some stockholders received some benefit, whether large or small, from the use of the water. That statute was intended to foreclose forever such contention by a water user who permits his land to lie idle while his neighbors improve theirs and build up the land values in the community. There was not a word of evidence as to the value that any stockholder derived from the use of appellee's water. The testimony of Mr. Heiss (R. 252-258) and Mr. Stocking (R. 266-267) shows clearly that it would be impossible to determine the value, and in years of ample water supply it obviously had no value.

It is elementary law that when a water user fails to use his water, it may be used without charge by other appropriators or water users. The Court's finding is not only contrary to law, but it is also entirely unsupported by the evidence. If appellee were permitted to show that the water was used by others, the record is wholly lacking as to the value of the use. But the statute expressly forbids the offset approved by the Court and claimed by appellee.

IX

The Court Erred in Holding That There Was No Evidence Showing the Amount of the Improvements and Expenditures Made on the Irrigation System and for the Rental and Purchase of Additional Water, Reservoir Capacity, and Storage Rights:

(Specification of Error No. 11)

The Court found (XVIII, R. 105) that certain improvements had been made on the irrigation system, and says:

> "No evidence appears showing the amount of such improvements done in the aggregate during the three-year period (1935 to 1937, inclusive) involved in this suit."

The finding presumably was intended to justify the conclusion that there were no equities in favor of appellant because of the expenditures it was led to make upon the recommendation of Mr. Shepherd, appellee's president and also manager of appellant, and which resulted in improving appellee's water right and increasing the value of its stock. The finding is not supported by the evidence. Mr. Hurlebaus showed in detail the extent of the expenditures (R. 226, 243, and Reporter's typewritten transcript on file with the Clerk, pp. 153-154). The expenditures made and obligations incurred aggregated approximately $669,000. They are set out in sufficient detail in our discussion on the question of estoppel in this brief. The Court's Finding is accordingly without any support from the evidence, for it shows clearly the amount of every important item.

X

Appellee's Right to Water Has Been Lost by Non-User for More Than Five Years:

(Specification of Error No. 6)

Appellee proved (R. 208) that "the land in question has not been farmed since its acquisition" and the Court found that appellee had used no water on its lands (R. 105), but it concluded (VIII, R. 113) that the water rights for appellee's lands had not been abandoned or forfeited through non-user.

The abandonment of the water right by non-user was pleaded as a defense by appellant (R. 58-59), and it was admitted by appellee that no water has been applied to beneficial use on these lands since they were acquired by appellee, as shown in Exhibit 1 (R. 114-133).

Section 41-216, Idaho Code Annotated, provides as follows:

> "All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through non-user or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter."

We think the Court had no discretionary power to extend or enlarge the clear and positive provisions of the statute. The right to the use of water is granted

by the state on condition that the water be applied to beneficial use. If the grantee fails for a period of five years so to apply it, the condition is broken and the grant automatically fails and the water reverts to the state.

There would seem to be no authority for the finding and conclusion of the Court that appellee, in the face of its own statements and admissions of non-user, for as long, in some cases, as 25 years, may still hold its water right.

XI

The Relation of Principal and Agent Exists Between a Client and His Attorney, and the Advice of the Attorney on Which the Client Acts and Which He Applies in the Making of Settlements and Adjustments Is Admissible for the Purpose of Explaining the Action and Intention of the Client, But Not as Evidence of the Law:

(Specification of Error No. 17)

Appellant offered in evidence Exhibits 38 and 39 (R. 238-240) for the purpose of explaining appellee's action in paying assessments levied by appellant, and in making adjustments of maintenance charges against lands that were acquired by appellee through foreclosure, or by quitclaim deed from settlers, and for disproving the contention of appellee that it had paid maintenance and assessment charges as a sort of good will offering, and that it had not acquiesced in appellant's contention as to the meaning of the statute under which the assessments were levied.

The exhibits referred to consist (No. 38) of a letter dated October 23, 1925, from appellant's secretary,

Mr. Hurlebaus, to Messrs. Walters & Parry of Twin Falls, Idaho, counsel for the bondholders' committee and for the Twin Falls North Side Land & Water Company and the Twin Falls North Side Investment Company. The letter requested advice as to the basis on which the maintenance charges should be adjutsed or paid by the Investment Company in view of the decision in the Portneuf-Marsh case. The inquiry was specifically about Lot 2, Sec. 1, Twp. 9 S., R. 15 E., one of the tracts involved in the present action and set out on page 126 of the record, being line seven from the bottom of the tabulated statement on that page. It should be remembered that at that time all of the parties were occupying the same office and were closely affiliated, as testified to by Mr. Heiss (R. 246-247). Judge Walters replied (Ex. 39, R. 239) under date of October 30, 1925, and instructed appellant as to the basis on which maintenance charges against his clients should be adjusted, and the assessments and maintenance charges were thereafter paid on that basis by appellee, to and including the year 1931, and that basis was never questioned or protested until the commencement of this suit.

The exhibits referred to were excluded by the Court on the objection of counsel for appellee (R. 237-238).

We submit that the ruling of the Court was not correct and that the exhibits should have been admitted in evidence.

The relation of attorney and client is one of *agency*, governed by the general rules of law that apply to other agents.

7 C.J.S., Sec. 67, p. 850.

In 5 Am. Jur., Sec. 67, p. 298, the rule is stated as follows:

> "Where a relation of attorney and client exists, the client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority, even though the attorney is without a license."

Again, on page 301, Sec. 71, it is said:

> "With regard to the effect upon a client of acts of his attorney done without express authority, the usual rule as to such acts of agents applies, and under some circumstances the client will be held to have ratified the unauthorized acts of its attorney or to be estopped to deny the latter's authority."

Other authorities to the same effect are cited in the summary of the argument under this head.

In the management of a case in Court a special rule of agency applies, but in other matters in which the attorney advises and counsels a client, or gives instructions to those who have dealings with his client, the ordinary law of agency applies.

That appellee and its predecessors ratified and approved the instructions or advice given by Judge Walters in Exhibit 39 is not contradicted. The Investment Company made settlement in accordance with the instructions of the attorney, and appellee and its predecessors for six years thereafter made settlements regularly and paid the assessments levied against the lands in question.

Again we submit that the exhibits should have been admitted in evidence and should have been considered by the Court in deciding the case. These exhibits have an important bearing on many issues in the case.

XII

The Portneuf-Marsh Valley Case:

Appellee rested its case on the decision in Porteuf-Marsh Valley Canal Co. vs. Brown, 274 U.S. 630, 71 L. Ed. 1243, and the Trial Court apparently was persuaded that the decision in that case would control the case at bar. We desire therefore to point out briefly the distinguishing features between the two cases and the reasons why the Portneuf-Marsh case, in our opinion, has no application except in its construction of Section 41-1726, Idaho Code Annotated, and as to that statute the Supreme Court of Idaho has held otherwise and against appellee's construction.

The Portneuf-Marsh case did not involve assessments levied under Chapter 19, Title 41, on which appellant relies. It involved none of the questions discussed in this brief, except Section 41-1726, and as to that statute it refused to give consideration to the qualifying clause, "*said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land.*"

On that point the decision is directly contrary to that of the Idaho Supreme Court in Continental & Commercial Trust & Savings Bank vs. Werner, 36 Ida. 602, 215 Pac. 458, wherein that Court laid special emphasis on the clause which was disregarded in the Portneuf-Marsh decision. The Idaho Court expressly

held that under C.S., Sec. 3019 (now Sec. 41-1726), *"the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land,"* and that is the construction that has been placed upon the statute with the sole exception of the decision of this Court and the Supreme Court of the United States in the Portneuf-Marsh case.

We need not cite authority to the proposition that the construction of a local statute by the State Supreme Court is binding on the Federal Courts; and this Court, as did the Supreme Court, has expressly held that the Carey Act lien statute on which appellee relies *is a local statute.* (Equitable Trust Co. vs. Cassia County, 5 Fed. [2d] 955).

Referring again to the records in the Portneuf-Marsh case and in the case at bar, we note the further distinctions:

(a) In the Portneuf-Marsh case the contest was between the trustees, who had a first mortgage or trust deed on the irrigation system, water rights and water contracts, on the one hand, and the operating company on the other hand, while in the case at bar it is between the construction company and the operating company, without any mortgage or lien upon the system.

(b) The assessments involved in the Portneuf-Marsh case were assessments levied under the general business corporation statute by the operating company upon *its own stock,* which was simply evidence of a water right in a irrigation system *on which the trustees held a first and prior lien.*

(c) The decision of the Court was in substance to the effect that the attempted sale of the *stock* under the assessments levied thereon did not withdraw or release the water rights and interest of the landowner in the irrigation system from the lien of the mortgage or trust deed, but the sale of the stock was subject to such lien.

(d) Both this Court and the Supreme Court in the Portneuf-Marsh case called attention to the *by-laws* of the operating company and *to a contract between the two companies,* in substance to the effect that all shares of stock should be held subject to the rights of the construction company until the amount due such company, its successors or assigns, had been fully paid.

On page 898, 5 Fed. (2d), this Court quotes from the by-laws of the operating company as follows:

> "All shares of this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due to such company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchasers of shares, and as provided in the contract between the said Portneuf-Marsh Valley Irrigation Company, Limited, and the state of Idaho."

The Supreme Court of the United States, p. 639 of the official report, p. 1270, 71 L. Ed., says that the *contract between the two companies* was to the same effect.

There is no such contract between appellee and appellant and there are no such provisions in the by-

laws of appellant. In the Portneuf-Marsh case the Supreme Court said that Chapter 19, Title 41, although not involved in that case, apparently meant that the assessments therein authorized would be subject and subordinate to other liens in addition to the lien for taxes. But the Supreme Court of Idaho has held otherwise. See Federal Land Bank of Spokane vs. Bissonnette, 51 Ida. 219, 4 Pac. (2d) 364, and Sanderson vs. Salmon River Canal Co., Ltd., 45 Ida. 244, 263 Pac. 32.

The Supreme Court of the United States said that Sec. 5631 of the Compiled Statutes (now Sec. 41-806, I.C.A.) was not applicable to the case. That was clearly true in view of the fact that the assessments were only on the stock and not on the water rights and land. But the Supreme Court of Idaho has expressly held that the section referred to *does apply to an operating company like appellant and that assessments may be levied under that section.*

See Adams vs. Twin Falls-Oakley Land & Water Co., 29 Ida. 357, 161 Pac. 322.

Blaine County Canal Co. vs. Hansen, 39 Ida. 649, 292 Pac. 240.

Appellee proved in the case at bar that the mortgage was released and the bonds cancelled, and stock in appellee issued in payment of the bonds (R. 204). If any of the original bondholders are still stockholders of appellee, their position is no different than that of the other stockholders and appellee has no advantage in law because some of its stockholders may at one time have held bonds which then were secured by a mortgage on appellant's irrigation system.

WHEREFORE, We respectfully submit that the decree and findings of the Trial Court be vacated and set aside and the cause remanded with instructions to dismiss the case, or with other appropriate directions in harmony with the views of this Honorable Court.

WAYNE A. BARCLAY,
Residence: Jerome, Idaho;

FRANK L. STEPHAN,
J. H. BLANDFORD,
Residence: Twin Falls, Idaho;

RICHARDS & HAGA,
Residence: Boise, Idaho,
Attorneys for Appellant.

APPENDIX

Statutes of Idaho deemed pertinent to the issues involved (Sections are of Idaho Code Annotated, 1932):

PLACE OF TRIAL OF ACTIONS

5-401. Actions Relating to Real Property.—Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate of interest therein, or for the determination in any form of such right or interest and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

FORECLOSURE OF MORTGAGES AND OTHER LIENS

9-101. Proceedings in Foreclosure—Effect of Foreclosure on Holder of Unrecorded Lien.—There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.

No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

GENERAL STATUTE ON DISTRIBUTION OF WATER TO CONSUMERS

41-806. Amount and Lien of Rental or Maintenance.—The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given shall in all cases be subject to the lien for price of water as provided in this section.

(Laws 1895, p. 180, effective March 17, 1895; C.S. 5631.)

CHAP. 17, TITLE 41—RECLAMATION OF CAREY ACT LANDS

41-1725. Appurtenancy of Water Right.—The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state.

(Laws 1895, page 227, effective May 8, 1895; C.S. 3018.)

41-1726. Lien for Purchase-Price of Water Right.—Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired.

(Laws 1895, pages 227-228, effective May 8, 1895; C.S. 3019.)

41-1727. Record of Water Contract.—The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate.

(Laws 1895, p. 228, effective May 8, 1895; C.S. 3020.)

41-1728. Foreclosure of Lien.—Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company or persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right.

(Laws 1895, p. 228, effective May 8, 1895; C.S. 3021.)

CHAP. 19, TITLE 41—OPERATING COMPANIES—LIEN FOR MAINTENANCE CHARGES

41-1901. Maintenance Charges—Right to Collect—Basis of Assessment—Lien.—Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands, regardless of whether such water is used or not from said irrigation works, reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or association and meeting the obligations thereof, which tolls, assessments and charges shall be equally and ratably levied and may be based upon the number of shares or water rights held or owned by the owner of such land as appurtenant thereto or may be based upon the amount of water used; and such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter; provided, that any right to levy and collect tolls, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter.

(Laws 1913, Ch. 120, Am. 1919, Ch. 115; C.S. 3040.)

41-1902. Statement to Be Filed with County Recorder.—Any company, corporation or association claiming the benefits of this chapter shall, on or before the first day of April of each year, file for record with the county recorder of the county or counties in which the land lies to be affected, a statement in writing containing the name of such company, corporation or association, the general or common name of such canal system and irrigation works, or a general description of the same sufficient for identification, the amount of such charge for sudh year, and the date or dates when payable.

(Laws 1913, Ch. 120; C.S. 3041.)

41-1903. Filing of Claim of Lien.—On or after the first day of November and prior to the first day of January thereafter, the company, corporation or association, claiming the benefit of the lien herein provided, as against any parcel of land upon which the tolls, assessments and charges shall not have been paid, shall file for record with the county recorder for the county in which such land is situated, a statement containing the name of such company, corporation or association, the general or common name of the canal systems or irrigation works, or a general description of the same sufficient for identification, a statement of the lien claimant's demand, after deducting all just credits and offsets, a description of the particular tracts or parcels of land to be charged with the lien sufficient for identification, with the name of the owner or reputed owner, if known, of each particular tract or parcel, which claim must be verified by the oath of the claimant or its attorney or agent, to the effect that affiant believes the same to be just: provided, that the claim or claims for liens against all land upon which the same is claimed for one year, may be made in one or more instruments, regardless of the number of owners, reputed owners or proprietors.
(Laws 1913, Ch. 120; C.S. 3042.)

41-1904. Duties of County Recorder.—The county recorder must record the statements mentioned in this chapter in a book kept by him for that purpose, and such record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments.
(Laws 1913, Ch. 120; C.S. 3043.)

41-1905. Limitation of Lien.—No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in section 41-1903, unless proceedings be commenced in a proper court within that time to enforce such lien.
(Laws 1913, Ch. 120; C.S. 3044.)

41-1906. Foreclosure Proceedings Relate Only to Water or Water Rights.—In the event that the owner or holder or occupant of the premises upon which water has been purchased or contracted for, has not, at the time of the filing of the claim of lien provided for in section 41-1903, received title to the premises so occupied or held by him, and liens are filed as provided for in this chapter, the proceedings for foreclosure herein provided for shall relate only to the said water or water rights and the said water or water rights shall be sold in like manner as if title to the premises had been acquired by the holder or occupant of said land, or the owner or holder of the said water right or water appurtenant to said land."
(Laws 1919, Ch. 120; C.S. 3044.)

41-1907. Foreclosure of Lien.—Proceedings in the way of civil action in the district courts may be commenced and maintained to enforce the lien herein provided, which proceedings may embrace one or more parcels of land, or one or more landowners, or reputed landowners; and except as otherwise provided herein, the provisions of the Idaho laws relating to civil actions, new trials and appeals, are applicable to and constitute the rules of practice in proceedings under this chapter; and except as otherwise provided, the nature and effect of a judgment of foreclosure shall be the same as the foreclosure of a first real estate mortgage; provided, that the sale of such land under foreclosure shall pass to the purchaser, all ditch and water rights appurtenant thereto, and the interests, including corporate stock, of the owner or holder of such land in such corporation, company or association.
(Laws 1913, Ch. 120: C.S. 3046.)

41-1908. Interest on Delinquent Assessments.—All charges levied under the provisions of this chapter shall draw interest at twelve per cent per annum from the time when due and payable, to the entry of judgment of foreclosure, and the right of lien shall extend to such interest and the costs of foreclosure.
(Laws 1913, Ch. 120; C.S. 3047.)

41-1909. Release of Lien.—It shall be the duty of the company, corporation or association of persons filing a lien statement as provided in section 41-1903, to cause a release of the same upon the records of the county where filed, in the same manner and with like penalties for failure as is or may be provided by law in case of real estate mortgages.
(Laws 1913, Ch. 120; C.S. 3048.)

41-1910. Interpretation.—This chapter shall not be held to affect the rights of any person, corporation, company or association of persons to charge or collect tolls, charges or assessments to which it may be otherwise entitled; nor the right of a corporation to make assessments upon its stock according to law; nor the obligation of a stockholder or member of any corporation or association otherwise created; nor any other lien or right of lien given by the laws of this state, or otherwise.
(Laws 1913, Ch. 120; C.S. 3049.)